

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

THE JOHN ERNEST LUCKEN
REVOCABLE TRUST and
JOHN LUCKEN and MARY LUCKEN,
Trustees and Individually,

No. C16-4005-MWB

Plaintiffs,

Sioux City, Iowa
April 12, 2018
8:23 a.m.

vs.

HERITAGE BANCSHARES GROUP,
INC., and HERITAGE BANK
NATIONAL ASSOCIATION,

Volume 4 of 4

Defendants.

_____/

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE MARK W. BENNETT
SENIOR UNITED STATES DISTRICT JUDGE, and a jury.

APPEARANCES:

For the Plaintiffs: STANLEY J. THOMPSON, ESQ.
JASON RAY LAWRENCE, ESQ.
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For the Defendants: DAVID L. REINSCHMIDT, ESQ.
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Also present: John Lucken
Bill Peterson
Robert Mathiasen

Reported by: Shelly Semmler, RMR, CRR
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1 (Proceedings reconvened outside the presence of the
2 jury.)

3 THE COURT: Thank you. Please be seated. Anything we
4 needed to take up this morning?

5 MR. REINSCHMIDT: No, Your Honor.

6 MR. THOMPSON: No, Your Honor.

7 THE COURT: Okay. Thank you. Do we have the witness
8 here? Yes, he can just resume his place on the witness box.

9 (The jury entered the courtroom.)

10 THE COURT: Good morning. Please be seated. And you
11 will recall that Mr. Harbison was on the stand, and we're
12 getting ready for the cross-examination by Mr. Lawrence; is that
13 correct?

14 MR. LAWRENCE: Yes, Your Honor. Thank you.

15 THE COURT: Okay. Thank you. You may proceed
16 whenever you're ready.

17 THOMAS HARBISON, DEFENDANTS' WITNESS, PREVIOUSLY SWORN

18 CROSS-EXAMINATION

19 BY MR. LAWRENCE:

20 Q. Good morning, Mr. Harbison.

21 A. Good morning.

22 Q. Your expert disclosure in this case says that your review
23 of this file was conducted on June 11, 2012; correct?

24 A. Correct.

25 Q. Now, you knew nothing about these facts before that date,

1 did you?

2 A. No.

3 Q. And Ford Credit was already paid off by then, wasn't it?

4 A. I believe it was.

5 Q. I want you to assume that Ford Credit had not been paid
6 off. At that point they would have had first access to at least
7 \$225,000 worth of Dirks Motors' personal property before the
8 bank; right?

9 A. That's right.

10 Q. And Ford would have had more -- an interest in more than
11 just vehicles and parts bought on a floor plan, wouldn't it?

12 A. Yes.

13 Q. And that included accounts receivable in the Ford
14 franchise, didn't it?

15 A. If there were any.

16 Q. That also included the furniture, fixtures, and other items
17 of value, didn't it?

18 A. Yes.

19 Q. And the SBA loan authorization required Heritage to have
20 the first perfected lien interest in these things, didn't it?

21 A. That's what the loan authorization said.

22 Q. Now, the loan authorization, unless amended, means what it
23 says, doesn't it?

24 A. Yes.

25 Q. I'd like to pull up Exhibit 11, page 1. Now, Mr. Harbison,

1 when you read contracts like this loan authorization, do you
2 read them, you know, front to back first page to last?

3 A. Of course.

4 Q. Okay. Now, yesterday Mr. Reinschmidt asked you about this
5 section A, the guarantee fee. And if you take a look at that
6 section, it says that the SBA will pay the fee; correct?

7 A. Yes.

8 Q. Okay. Now I'd like to just quickly go ahead to page 2.
9 And I'd like to take a look at the contingencies. Now, one of
10 these contingencies is -- you know, it says it's contingent upon
11 the lender having paid the full guaranteed fee. Do you see
12 that, number 2?

13 A. Yes.

14 Q. Now, it also says that the fee has to be paid in the time
15 and manner required by this authorization; correct?

16 A. Yes.

17 Q. So having read that previous section that the SBA will pay
18 the fee, that wouldn't be inconsistent with this requirement
19 that the lender pay the fee, would it?

20 A. No.

21 Q. Now I want you to assume again that Ford Credit hadn't been
22 paid off by Heritage Bank after Mr. Lucken wired money to
23 Heritage Bank. Ford's -- Ford would have had to have foreclosed
24 on Dirks Motor; correct?

25 A. Correct.

1 Q. And that would have required Ford to foreclose on Dirks
2 Motors' Ford franchise; correct?

3 A. Correct.

4 Q. And if Ford foreclosed on the franchise, do you think GM or
5 Chevrolet would have soon followed?

6 A. I don't think they were involved in the thing.

7 Q. Okay. But Ford holding the franchise would have put Dirks
8 Motor out of business overnight, wouldn't it?

9 A. Absolutely.

10 Q. And then if Dirks Motor goes out of business overnight, the
11 bank would have had no choice but to foreclose on the loan
12 backed by the SBA guarantee; correct?

13 A. That's right.

14 Q. Now, I want you to assume that this happened in November,
15 December of 2011, Ford foreclosing on Dirks Motor and then it
16 going out of business. Are you aware if Dirks Motor had any new
17 car inventory at this time?

18 A. No.

19 Q. You're not aware or --

20 A. I'm not aware of it.

21 Q. All right. Now I want you to assume that Dirks Motor had
22 no new car inventory at this time. At this point of Ford
23 foreclosing with no new car inventory, Heritage and Ford would
24 have both been claiming an interest in Dirks Motors' accounts
25 receivable, furniture, fixtures, general intangibles like the

1 franchise agreements, wouldn't they?

2 A. Yes.

3 Q. And Heritage would have lost that fight, wouldn't they?

4 A. They would have been in second position.

5 Q. Okay. And the SBA, based on the terms of the
6 authorization, would have expected Heritage to be in first
7 position; correct?

8 A. No, they would not have because the SBA, as I said
9 yesterday, does not take anything in terms of automobile
10 inventory. In the --

11 Q. Sir, I'm not talking about automobile inventory. I'm
12 talking about the desks and the computers in the dealership
13 building. I'm talking about the infrastructure, the lifts and
14 the other things in the service bay that aren't covered by the
15 floor plan financing. I'm talking about accounts receivable,
16 and I'm talking about the franchises.

17 A. Yes, they would have.

18 Q. Okay. The SBA would have expected Heritage to be in first
19 position on those things.

20 A. According to the loan authorization.

21 Q. Now, Heritage benefitted from the sale of Dirks Motor
22 because the principal balance on Heritage's loan was reduced by
23 proceeds of that sale; correct?

24 A. Say that again.

25 Q. Are you aware that Heritage -- or I'm sorry. Are you aware

1 that Dirks Motor was ultimately sold to Total Motor?

2 A. No.

3 Q. Okay. I want you to assume that Heritage -- that Dirks
4 Motor was sold to Total Motor and that \$450,000 of that sale
5 went to pay down the SBA loan. Heritage benefitted from that
6 \$450,000, didn't it?

7 A. I'm not sure I understand what you're asking me.

8 Q. Okay. Well, let's back up. The SBA loan guarantee was for
9 84.5 percent of the total value of the SBA loan in this case;
10 correct?

11 A. I thought it was 75 percent, but it may have been 84 1/2.

12 Q. Okay. Let's just assume that it was 84 1/2. That means
13 for every dollar Heritage doesn't collect on the loan of the
14 loan principal the SBA would have paid Heritage 84.5 cents, and
15 Heritage would have been at risk for 15.5 cents; right?

16 A. That's correct.

17 Q. So for a hundred thousand dollars, the SBA would have paid
18 Heritage \$84,500, and Heritage would have been at risk for
19 \$15,500; correct?

20 A. Yes, yes.

21 Q. So if Heritage was able to get \$450,000 from the sale
22 proceeds of Dirks Motor to pay down the principal, they would
23 have benefitted 15,000 times 4, 62,000 -- about \$70,000;
24 correct?

25 A. They would have.

1 Q. Now, the SBA would view a large collateral shortfall on an
2 SBA guaranteed loan unfavorably, wouldn't it?

3 A. Say that again.

4 Q. You have the loan from Heritage to Dirks Motor.

5 A. Yes.

6 Q. It's backed by collateral.

7 A. Yes.

8 Q. Now, if that loan were to have a large collateral shortfall
9 where after Heritage collected all of the collateral available
10 to it there would still be a large principal balance, a
11 shortfall, the SBA would view that unfavorably, wouldn't it?

12 A. Well, they had other collateral, the SBA did, that they
13 could liquidate, and that was a significant portion of the
14 collateral. And they had taken that on the very beginning
15 between CDs, the real estate, and life insurance.

16 Q. And after they took all of that, there was still a
17 shortfall of about \$600,000, wasn't there?

18 A. I don't know what the shortfall was.

19 MR. LAWRENCE: Can we pull up Exhibit 145? And go to
20 page 2.

21 Q. Let's take a look at the collateral, this grid at the
22 bottom of the page. Now, this is a bank document, a CAD report,
23 prepared by Heritage Bank. But these are the CDs that you were
24 just talking about, Mr. Harbison; correct?

25 A. Yes.

1 Q. Can we go to page 3? Now, up at the top here, these are
2 the cash value of the life insurance policies and then the first
3 lien on the commercial real estate you were just talking about;
4 correct?

5 A. That's correct.

6 Q. And I'll tell you this report was prepared at I believe the
7 end of September of 2011.

8 MR. LAWRENCE: So, Rebecca, can you highlight the
9 excess collateral grid?

10 A. Okay.

11 Q. And you see that there was a collateral shortfall at this
12 point in time of nearly \$600,000; correct?

13 A. That's correct.

14 Q. Now, this is -- I'll represent to you that this is before
15 Mr. Lucken wired the money to Heritage to pay off Ford. And so
16 at this point Ford would have had access to the first \$225,000
17 from Dirks Motor; correct?

18 A. Correct.

19 Q. So that would have potentially increased this, you know,
20 collateral shortfall, wouldn't it?

21 A. Yes, it would have.

22 Q. And the SBA on a 1.7-million-dollar loan would take a long,
23 hard look at a collateral shortfall of \$600,000 of that 1.7
24 million dollars, wouldn't it?

25 A. No, they wouldn't.

1 Q. And the SBA would not consider reducing a guarantee if
2 there were a collateral shortfall of nearly \$600,000 on a
3 1.7-million-dollar loan that was backed by an SBA guarantee,
4 would it?

5 A. No, they wouldn't.

6 Q. Now, it was your opinion that this loan was closed
7 correctly; right?

8 A. Yes.

9 Q. I'd like to go to Exhibit 13. This is what's called a
10 Small Business Administration settlement sheet; correct?

11 A. Yes.

12 Q. And this is -- this settlement sheet is not submitted to
13 the SBA at the time the bank and the lender signs it, is it?

14 A. This sheet here is not submitted to SBA when?

15 Q. At the time --

16 MR. LAWRENCE: Can we go down to the signature page or
17 the signature block?

18 Q. So here when the loan is closing and the bank and the
19 borrower sign it, it's not submitted to the SBA at that time, is
20 it?

21 A. It's held in the bank's files.

22 Q. Okay. And right below it where it says -- the signatures
23 where it says this certification must be signed and retained in
24 the lender's file after each disbursement, that just means the
25 bank has to hang on to it; correct?

1 A. That's correct.

2 Q. Okay. Now I'd like to go back up to the part where it
3 shows the disbursement. Now, we see there at the bottom the
4 name of the payee, Peoples Bank, the date, and the amount of the
5 payment, \$279,000; correct?

6 A. Correct.

7 MR. LAWRENCE: Now, can we go to Exhibit 11, page 3.
8 I'm sorry. One more page, up at the top here.

9 Q. These are the use of the proceeds of the SBA loan as
10 required in the SBA loan authorization; correct?

11 A. Correct.

12 Q. So if Heritage Bank did not use the money in the SBA loan
13 consistently with these terms, it would have breached the SBA
14 loan authorization; correct?

15 A. Not necessarily.

16 Q. Would it need the SBA's approval to disburse monies
17 differently than what is listed here in this --

18 A. They would have got -- they would have asked SBA for
19 approval. That's right.

20 Q. And if they didn't ask the SBA for approval and distributed
21 the monies differently than this, they would have been in
22 violation of this authorization; correct?

23 A. Well, at that point in time. But they may have -- if it
24 got to the point where they were questioning that, they could
25 have worked through that.

1 Q. But at that point in time -- that's what I want to focus on
2 from what you just said. At that point in time they would have
3 been in violation of the authorization.

4 A. That's right.

5 Q. Okay. And we just saw Peoples, so I want to look at item
6 number 2, \$276,000 to Peoples. And now I want to go down to the
7 first sentence of this page, all amounts listed above are
8 approximate. Would the \$279,000 we just saw on the settlement
9 sheet be considered a reasonable approximation of this \$276,000
10 by the SBA?

11 A. Yes.

12 Q. Okay.

13 MR. LAWRENCE: I'd like to go back to Exhibit 13, page
14 2. And can you highlight the top half?

15 Q. So this is a distribution made from the SBA loan proceeds
16 to Dirks Motor to First American for \$401,918; correct?

17 A. Yes.

18 Q. Okay.

19 MR. LAWRENCE: And can we go back to Exhibit 11, page
20 4? And highlight that top portion again.

21 Q. And here we saw First American. I believe that says --
22 it's a little fuzzy but down there on number 7, \$400,000?

23 A. Yes.

24 Q. Would what we have just seen be a reasonable approximation
25 of this amount?

1 A. Okay.

2 Q. And I'd like to go back to Exhibit 13, page 2. And, again,
3 at the bottom you see that this was signed by both Heritage Bank
4 and Mr. Dirks; correct?

5 A. Yes.

6 MR. LAWRENCE: Now can we go ahead to page 3.

7 Q. And this is a distribution to First National Bank for
8 \$756,000; correct?

9 A. Yes.

10 Q. Okay. And can we look at the bottom of the page? And we
11 see Heritage's signature here and Mr. Dirks' signature; correct?

12 A. Yes.

13 MR. LAWRENCE: Now can we go ahead to page 4.

14 Q. Okay. So that those are --

15 MR. LAWRENCE: And now can we go back to Exhibit 11,
16 page 4.

17 Q. Now we just saw First National, and they're listed a few
18 times here; correct? 110,000 --

19 A. Correct.

20 Q. 225, 35, and down there on number 8, 340.

21 A. Correct.

22 Q. Okay. And those amounts would be a reasonable
23 approximation of what was paid to First National; correct?

24 A. Yes.

25 Q. Okay. I'd like to go back to Exhibit 13, page 8. Now,

1 this shows that Heritage Bank was paid off \$329,000; correct?

2 A. Yes.

3 Q. Okay. Can we look at the bottom? Heritage never signed
4 this, did it?

5 A. No.

6 Q. And the certification must be signed and retained in the
7 lender's file; correct?

8 A. Correct.

9 Q. This is an irregularity, isn't it?

10 A. Yes.

11 Q. Your report didn't identify this, did it?

12 A. No.

13 Q. Okay.

14 MR. LAWRENCE: Can we go back to Exhibit 11, page 4?

15 Q. Now I want you to look at line number 6. \$194,000 to pay
16 outstanding debt to Heritage Bank, do you see that?

17 A. Yes.

18 Q. That's not a reasonable approximation of \$329,000, is it,
19 Mr. Harbison?

20 A. No. SBA had a 10 percent amount.

21 Q. That's an irregularity then, isn't it?

22 A. It is.

23 Q. Your report didn't identify that irregularity, did it?

24 A. No, it did not.

25 Q. I want you to go up to number 1, \$67,000 for working

1 capital. Do you see that?

2 A. Yes.

3 Q. Do you know if Dirks Motors ever received that \$67,000 for
4 working capital?

5 A. No, I do not know.

6 Q. You reviewed this entire SBA loan, sir, didn't you?

7 A. I'm sorry?

8 Q. You reviewed this entire SBA loan file.

9 A. We reviewed the documents that were necessary when the loan
10 was closed. That's the documents we reviewed.

11 Q. And the settlement sheets were part of the documents that
12 you reviewed because those were necessary when the loan was
13 closed; correct?

14 A. No. Those are made when the funding is done.

15 Q. Okay. So you never reviewed the settlement sheets?

16 A. No.

17 Q. Okay. Did you see anything in your review of the file that
18 suggested Dirks Motor received \$67,000 in working capital?

19 A. No.

20 Q. If it did not receive the \$67,000 in working capital, would
21 that have been an irregularity?

22 A. No, it would not have.

23 Q. So even though the loan authorization required Dirks Motor
24 to get money for working capital, it would not have been an
25 irregularity had it not received the money required by the loan

1 authorization?

2 A. At any point in time when the loans are being funded like
3 that, S -- the bank can request that those amounts be cancelled.

4 Q. Okay.

5 A. So I don't know if this was cancelled or not.

6 Q. Do you know if Heritage made such a request?

7 A. No.

8 Q. Have you seen any evidence that suggests Heritage made such
9 a request?

10 A. No.

11 MR. LAWRENCE: Can we go to Joint Exhibit 20, please.
12 And can you zoom in on this top part?

13 Q. This is a form from the SBA; correct?

14 A. Yes.

15 Q. And it shows information about the loan and the guarantee,
16 doesn't it?

17 A. Yes.

18 MR. LAWRENCE: Can we go down to the bottom part,
19 please?

20 Q. And I want you to focus on this grid on the use of the
21 proceeds for the guarantee. Do you see that?

22 A. Yes.

23 Q. And do you see that it says in the first part that there's
24 1.583 million dollars of this loan allocated to pay outstanding
25 debt?

1 A. Yes.

2 Q. And with all those banks, the settlement sheets, that's
3 what we just looked at, isn't it, Mr. Harbison?

4 A. Yes.

5 Q. Okay. And you see the second part of this, working
6 capital, \$192,000.

7 A. Yes.

8 Q. Now, based on this sheet on a form from the SBA -- and we
9 can see that, you know, it's talking about October 7, 2009 --
10 the SBA at that time would have expected Dirks Motor to get
11 \$192,000 in working capital; correct?

12 A. That's correct.

13 Q. Now, if that money instead of going to Dirks Motor for
14 working capital went to Heritage Bank to pay off additional
15 loans that Heritage made to Dirks Motor, that's not what the SBA
16 expected, is it?

17 A. Not at this point.

18 Q. And Heritage would have been in breach of the
19 authorization, wouldn't it?

20 A. At that point in time.

21 Q. And your report didn't discover this irregularity, did it?

22 A. No, it did not.

23 MR. LAWRENCE: Nothing further, Your Honor.

24 THE COURT: Thank you, Mr. Lawrence.

25 Mr. Reinschmidt?

1 MR. REINSCHMIDT: Thank you, Your Honor. Your Honor,
2 I'm fine when I'm here, but the sun is absolutely blinding --

3 THE COURT: Well, there isn't anything I can do about
4 it.

5 MR. REINSCHMIDT: Oh, you can't shut that shade?

6 THE COURT: It is shut.

7 MR. REINSCHMIDT: Oh, it is. I couldn't tell. Thank
8 you.

9 REDIRECT EXAMINATION

10 BY MR. REINSCHMIDT:

11 Q. Mr. Harbison, Mr. Lawrence spent quite some time talking to
12 you about supposed irregularities between the 329,000 and the
13 194,000. Do you recall that, you just finished?

14 A. Yes.

15 Q. Okay. Did this -- do you recollect -- and I'll help you
16 recollect -- do you recollect if this loan increased from the
17 original authorization, the total amount of the loan, not merely
18 the 329,000 disbursement to Heritage but the total amount?

19 A. Yes.

20 Q. Let's look at Exhibit 11 on the first page of Exhibit 11.
21 And as we blow that up, again, can you remind the jury what
22 Exhibit 11 is? Can you tell the jury what that document is?

23 A. Oh. This is the loan authorization that was issued with
24 the approval on the loan.

25 Q. And I'm going to ask my paralegal to blow up just that

1 first part, this area. All right. And if we look at this that
2 I've just put a box around, what was the original amount of the
3 loan?

4 A. 1,650,000.

5 Q. And then there's a handwritten notation below it that says
6 1,775,000 attached. Do you see that?

7 A. Yes.

8 Q. I did the math quickly on that. I did that that's about
9 \$125,000 difference?

10 A. Correct.

11 Q. Okay. And when it says attached, does that mean that
12 there's some -- well, let me ask it this way. Does there need
13 to be SBA approval to go -- to increase that loan to 1.775
14 million?

15 A. Yes.

16 Q. And was that indeed the amount that was ultimately
17 borrowed?

18 A. Yes.

19 Q. And I also subtracted 194,000 from 329,000, and that's
20 about 135,000. Do you agree with my math or --

21 A. Yes.

22 Q. Okay. Do you know what -- why Heritage was asking to be
23 paid the extra 135,000?

24 A. No, I do not.

25 Q. Okay. Well, let's go to Exhibit -- Exhibit 12. And

1 actually I need to go to Exhibit 12, page 3. Well, can you tell
2 me on Exhibit 12, page -- we're flopping back and forth here.

3 On page 1, what is this document, Exhibit 12?

4 A. This is a approval of a change in the loan issued by SBA.

5 Q. Let's go to page 3 of Exhibit 12.

6 MR. REINSCHMIDT: And I think all we need to do is
7 maybe the top -- the top part including the writing through the
8 X, yes, blow that up.

9 Q. And this is saying -- is this a reference back to the same
10 Dirks 1.775 million loan?

11 A. Yes.

12 Q. And it has what I've circled -- I've written two circles.
13 And there's a check in the box that says, "Request that SBA
14 approve an increase in the loan amount." Do you see that?

15 A. Yes.

16 Q. And that increases it from the 1.65 million to the 1.775
17 million?

18 A. Yes.

19 Q. And then -- and then I'm also going to circle the
20 handwriting -- now, would this be handwriting from Heritage, or
21 would this be from SBA?

22 A. This would be from Heritage.

23 Q. And -- but in terms of the approval, that would have to
24 come from SBA?

25 A. Yes. And that's what this form is.

1 Q. And, in fact, let's go down a bit. And if we go down
2 towards the middle of the document where it says -- this portion
3 here -- and actually I'll include this -- it says U.S. Small
4 Business Administration, a stamp. Do you see that?

5 A. Yes.

6 Q. And then I -- oh, it looks like it says, "I do concur with
7 the request." Is that what that stamp says?

8 A. Yes.

9 Q. And then there's a line for signature with -- where it says
10 recommending official below the line. Do you see that?

11 A. Yes.

12 Q. So that means that Heritage -- somebody -- you think
13 somebody from Heritage has the handwriting about the -- saying
14 that the amount of the increase of 125,000 and then this person
15 from SBA has approved it.

16 A. Yes. This stamp on there would have been received by
17 Heritage before they wrote the other things on there.

18 Q. So as you see this now -- and this is within \$10,000 of
19 encompassing the \$329,000. Would -- does this document reflect
20 that there's going to be -- well, let me restate that.

21 Would SBA have been apprised of why the loan was
22 asking to be increased by \$125,000?

23 MR. LAWRENCE: Objection, Your Honor. Foundation.

24 THE COURT: Overruled. You may answer.

25 A. Absolutely.

1 Q. And here SBA has approved it.

2 A. Yes.

3 Q. Just a couple more things. I want to look at -- we were
4 talking about -- or Mr. Lawrence was talking to you about what
5 would happen if Ford Motor Credit had had to take inventory,
6 parts, equipment and they were ahead of Heritage on that. Do
7 you remember that testimony?

8 A. Yes.

9 Q. Correct me if I'm wrong, but I believe your testimony was
10 by the ti -- there's been testimony in this case that Ford Motor
11 Credit was paid with Mr. Lucken's funds.

12 A. Yes.

13 Q. On approximately November 17, 2011.

14 A. Uh-huh, yes.

15 Q. Given that testimony, do you recollect if Ford had taken
16 all its cars prior to the time they were paid any arrearage?

17 A. I do not.

18 Q. If there's testimony in this case they had taken cars
19 October and early November, would you disagree with that?

20 A. No.

21 Q. So if the cars were gone, there was no inventory that Ford
22 could have gotten; correct?

23 A. That's right.

24 Q. So then if they went to parts and equipment, do you know
25 what the value of parts and equipment would have been to Ford

1 ahead of Heritage?

2 A. I don't know what it would have been, but in almost all of
3 the dealership loans that I have worked on, it's 5 percent or
4 less of the value.

5 Q. The value of what?

6 A. The inventory, that they -- all the things that are on
7 their UCC.

8 Q. All right. Well, let's go ahead and look at Exhibit 1020.
9 And Exhibit 1020 is a -- internal Ford memorandums. Let's go to
10 page 3 of Exhibit 1020. And I'm going to have Ms. Liston just
11 focus on the November 2011 entry, the whole November 2011 entry
12 if she can. And that says a number of things. It says -- we
13 were talking about were things sold by then. I think it says at
14 the very top the one remaining vehicle, a Malibu, was sold
15 Thursday, November 3, 2011. Do you see that?

16 A. Yes.

17 Q. So according to Ford's own internal documents, there were
18 no more cars left by the time Ford Motor Credit would have -- if
19 they'd had to proceed after this point, there was no inventory
20 they had to get at; correct?

21 A. Yes.

22 Q. If we then continue on down into that next paragraph, on
23 this portion, it says parts and equipment are worth 43,900 to
24 65,000. I blocked it out. \$65,800. Do you see that?

25 A. Yes.

1 Q. So if Ford had proceeded on November 17 according to this
2 document and your testimony, there would be no cars to seize;
3 correct?

4 A. Correct.

5 Q. Parts would be in that range according to Ford.

6 A. Correct.

7 Q. And beyond that, what could they get if you know?

8 A. I know of nothing.

9 Q. One last thing. I just want you to look at Exhibit 145.
10 And blow that up if you would. When we're looking under --
11 actually on 145, I want to go to the collateral section if we
12 can. And this is -- you talked about that with Mr. Lawrence.
13 This collateral, this is only Heritage's collateral on the SBA
14 loan guarantee; correct?

15 A. Correct.

16 Q. And that's dollar for dollar on those CDs.

17 A. Yes.

18 Q. Okay. Let's go to the next page that finishes the
19 collateral analysis. And you were being asked about what would
20 be left over. This is -- this document I believe -- actually if
21 we go back to the first page to just identify the very top left
22 of the first page, I think it's been referenced that this is a
23 Heritage internal document. It's called CAD management info.
24 Do you see that in the upper left?

25 A. Yes.

1 Q. All right. So let's now go back to that page that had the
2 collateral. So this is Heritage's calculation of life
3 insurance, and they've put down cash value, and that's what they
4 extend out to the right-hand column to get their total
5 collateral value. Do you see that?

6 A. Yes.

7 Q. Is that how SBA for their purposes with life insurance
8 calculates that, or did they do -- do they do it on death
9 benefits, or do they do it on cash value?

10 A. Cash value.

11 Q. Okay.

12 MR. REINSCHMIDT: That's all I have. Or just a
13 moment.

14 Q. At the end of the day after all your testimony, did SBA pay
15 the loan guarantee?

16 A. They did.

17 Q. These various alleged irregularities that plaintiff has
18 talked about, SBA still paid.

19 A. Yes.

20 Q. Regardless of those alleged claims.

21 A. Yes.

22 MR. REINSCHMIDT: That's all I have, Your Honor.

23 THE COURT: Thank you, Mr. Reinschmidt.

24 Mr. Lawrence?

25 MR. LAWRENCE: Very briefly, Your Honor.

RECROSS-EXAMINATION

1
2 BY MR. LAWRENCE:

3 Q. Mr. Harbison, there's a difference between paying off prior
4 debt and paying off and working capital; correct?

5 A. Paying off prior debt and working capital?

6 Q. Yes. Money allocated for working capital wouldn't be used
7 to pay off prior debt, would it?

8 A. No.

9 Q. Okay. I'd like to go to Exhibit 20, page 2 and the bottom
10 e-mail. I'm sorry. Up above the text of the e-mail. Now, if
11 you look at the bottom half of the page, this is from Mark
12 Danhoff, and he's with the SBA; correct?

13 A. Correct.

14 Q. And he says the attached article reflects -- and I believe
15 it says 12-28, 2009, as the date the additional funding hits the
16 SBA. Do you see that?

17 A. Yes.

18 Q. And that's the additional funding that Mr. Reinschmidt was
19 just talking to you about; correct?

20 A. Yes.

21 Q. Okay. What's 67 plus 192 -- or I'm sorry, 67 plus 125?

22 A. Almost 190, around 190.

23 Q. 192.

24 A. Okay.

25 Q. Okay? Now, you said that the SBA had to be told of a

1 reason for the increase in the loan value; correct?

2 A. That's right.

3 Q. You don't know -- you personally don't know what Heritage
4 told the SBA, do you?

5 A. No, I do not.

6 Q. So you don't know if Heritage told the SBA that extra money
7 was additional money to pay off a loan Heritage made to Dirks
8 Motor, do you?

9 A. No.

10 Q. Let's go back to page 1 of this document. And let's look
11 at the bottom. And again, let's look at this bottom grid.
12 There are two things, pay outstanding debt and working capital;
13 correct?

14 A. Correct.

15 Q. Now, if Heritage told the SBA that this additional \$125,000
16 was to pay off outstanding debt to Heritage as we saw on the
17 settlement sheet, you would expect that \$125,000 to be reflected
18 in that first part, pay outstanding debt, wouldn't you?

19 A. If they told them that.

20 Q. Okay. If Heritage told the SBA that that additional
21 \$125,000 was for Dirks Motor to have as working capital, you
22 would expect that to show up in the second part there, working
23 capital; correct?

24 A. Yes.

25 Q. And that says \$192,000, doesn't it?

1 A. Yes.

2 Q. Now, in the original SBA authorization we looked at on my
3 examination, it allocated \$67,000 for working capital, didn't
4 it?

5 A. Yes.

6 Q. And plus this extra \$125,000 Mr. Reinschmidt talked to you
7 about, that would total exactly \$192,000, wouldn't it?

8 A. That's correct.

9 Q. So would it be your conclusion that Heritage must have told
10 the SBA that money was for Dirks Motor to have as working
11 capital and not to pay off Heritage Bank's additional debt?

12 A. I would say yes. That would be reading what you're saying
13 if that's what it was.

14 Q. Okay. So do you believe at this point in time then that
15 Heritage misrepresented to the SBA the purpose of that
16 additional \$125,000?

17 A. No, because Heritage has the use of those proceeds to go
18 wherever they want to as working capital.

19 Q. But paying off debt to Heritage you admitted is not working
20 capital.

21 A. It could have been in their eyes.

22 MR. LAWRENCE: Okay. Nothing further.

23 THE COURT: Thank you, Mr. Lawrence.

24 Mr. Reinschmidt?

25 MR. REINSCHMIDT: Nothing, Your Honor.

1 THE COURT: Okay. Members of the jury, do we have any
2 questions for Mr. Harbison? Looks like we might. We'll see.
3 No?

4 JUROR BYL: I'm just curious about something.

5 THE COURT: Would you like -- you have a question?
6 Yeah. Okay. Why don't you pass it forward.

7 Thank you, Denise. Thank you.

8 Counsel?

9 (At sidebar off the record.)

10 THE COURT: Mr. Harbison, I'm going to ask you a
11 question.

12 THE WITNESS: Okay.

13 THE COURT: And then the lawyers will have an
14 opportunity to ask a follow-up question. The question is is it
15 common practice for a company to receive an SBA loan that
16 primarily would be used to pay off lenders?

17 THE WITNESS: I can answer that yes.

18 THE COURT: Any follow-up questions, Mr. Reinschmidt?

19 MR. REINSCHMIDT: No, Your Honor.

20 THE COURT: Mr. Lawrence?

21 MR. LAWRENCE: No, Your Honor.

22 THE COURT: Okay. Thank you. You may step down.

23 THE WITNESS: Thank you.

24 Everybody can take a stretch break.

25 And, Mr. Reinschmidt, are you ready to call your last

1 witness?

2 MR. REINSCHMIDT: I am, Your Honor.

3 THE COURT: Okay. Thank you. Good morning. If you'd
4 please come forward, raise your right hand, I'll swear you in.

5 GREG BURGER, DEFENDANTS' WITNESS, SWORN

6 THE COURT: Thank you. Please be seated in the
7 witness box there. You can adjust the chair and the microphones
8 so you can speak directly into the microphones. And would you
9 please tell us your first and last name and spell your last
10 name.

11 THE WITNESS: My name is Greg Burger, last name
12 spelled B-u-r-g-e-r.

13 THE COURT: Thank you.

14 Mr. Reinschmidt.

15 MR. REINSCHMIDT: Thank you, Your Honor.

16 DIRECT EXAMINATION

17 BY MR. REINSCHMIDT:

18 Q. Mr. Burger, how old are you?

19 A. I am 67 years old.

20 Q. And let's look just quickly at your résumé which is Exhibit
21 1033. And you'll see that in front of you on the screen. We're
22 not going to go through all of that. I just want to understand
23 generally has your entire career been in the banking industry?

24 A. It has.

25 Q. Okay. And basically if we look at that, it looks like

1 you've kind of worked up the chain of command, if you will,
2 primarily at Minnwest Bank in Luverne, Minnesota?

3 A. That's correct.

4 Q. And ultimately you became the CEO of that bank?

5 A. Yes, I was previously CEO of Minnwest Bank, Montevideo and
6 then also then transferred to Luverne as a CEO in Luverne
7 so . . .

8 Q. So pursuant to that -- so you were in the banking industry
9 how many years?

10 A. Oh, something over 40.

11 Q. And pursuant to that did you work on SBA loans, loan
12 guarantees, during your 40 or so years in the banking industry?

13 A. Yes, I did.

14 Q. And did you -- just generally speaking, was your -- was
15 your experience just in overseeing them, or did you do the
16 actual paperwork or not?

17 A. In both cases. As a junior lender, I was involved in
18 originating SBA loans and then after I became a CEO obviously
19 overseeing SBA loans and the closing of the loans and so forth
20 so . . .

21 Q. And pursuant to this case, did you -- did you get involved
22 in this case to overlook things in this case or review what had
23 happened in this case?

24 A. Yes. I was asked to provide consulting relative to review
25 of information and basically to give an opinion relative to the

1 outcome.

2 Q. And did you sit in on a number of depositions in this case?

3 A. I did.

4 Q. And you've reviewed many documents in this case?

5 A. Quite a few, yes.

6 Q. All right. Fair enough. What facts -- as you looked at
7 documents and thinking about this case, what -- what facts were
8 most important to you to look at or ascertain?

9 A. Well, I think the motivation behind the bank originating
10 the SBA loan originally and then where the bank found
11 themselves, the position the bank found themselves in later in
12 the transaction, and then obviously Mr. Lucken's involvement in
13 the transaction later as he injected capital into the business.

14 Q. As you reviewed Dirks Motor Company's situation -- well,
15 let me back up. Let's talk about the origination of the SBA
16 loan. Prior to that origination, there had been OCC enforcement
17 actions in Minnesota and in Iowa. Are you aware of that?

18 A. I am aware. I reviewed those documents.

19 Q. And then ultimately there were also terminations of those
20 enforcement agreements as well.

21 A. Correct. Actually the termination agreements came before
22 the -- I think the actions were three-year actions, and the
23 terminations actually happened ahead of the three years. So
24 they were -- they were taken off early.

25 Q. Were these enforcement actions that were initiated -- I

1 think they were both in 2008, 2009 -- were those common or
2 uncommon during that period?

3 A. As I think we all know, the economic situation at the time
4 was rather dire, and the housing bubble burst about that time
5 which created a lot of pressure on commercial real estate
6 lending per se. And I would guess -- this is a guess but I
7 think a fairly close estimate -- I know in the state of
8 Minnesota where I was doing my banking there were probably in
9 the neighborhood of 20 percent or more of the banks in that
10 particular state that were under some type of enforcement action
11 at that time.

12 Q. And ultimately when the OCC releases the enforcement
13 agreements, then what does that mean? What triggers the
14 termination of the enforcement agreements?

15 A. Well, the agreement provides for -- basically for
16 monitoring certain aspects of the bank. There's reporting that
17 goes along with that, and if the bank has fulfilled stipulations
18 of the agreement and the reporting has been done properly and
19 promptly, then the federal regulators will step back and say
20 you've done your job and we release you from the agreement.

21 Q. Let's move on then to the SBA -- the actual SBA loan
22 guarantee. When the SBA loan guarantee was originated or as it
23 followed through, there's been a lot of testimony in this case
24 about the fact that Ford Motor Credit had a superior lien to
25 cars, primarily to cars and parts, also accounts receivable --

1 that's called chattel paper too -- but let's just focus on the
2 cars and the parts. In your business as Minnwest Bank, did your
3 bank do floor planning for car dealers or anyone else?

4 A. We did some minimal floor planing agreements with used car
5 dealers, but to my knowledge I was never involved in floor
6 planning for new dealership.

7 Q. Why did you do even minimal amount for used car dealers?

8 A. Why --

9 Q. Or maybe not why. Tell me about the rudiments of floor
10 planning. I mean, what makes it a good thing for banks or a bad
11 thing for banks?

12 A. Well, in general banks are not involved in floor planning
13 arrangements with car dealerships, equipment dealerships, that
14 sort of thing. And it's primarily very advantageous for a
15 dealer to do business with the manufacturer, in this case Ford
16 Motor Credit. They give probably better interest rates to the
17 dealer than a bank could charge. They also -- if there are
18 units that they're trying to push to sell, they may give you 60
19 to 90 days' free interest to carry the inventory for them on
20 their lot. So it's very hard for banks to compete for floor
21 plan-type agreements with the manufacturers.

22 So other than used cars where there obviously is not
23 that manufacturer laying out there willing to do that work for
24 you, most banks I think are not involved in floor planning for
25 new equipment.

1 Q. Is it a labor intensive and administratively intensive type
2 of loan?

3 A. It's very -- if done properly, it's very intense in terms
4 of monitoring process. The line is set up so that advances are
5 made against the line as each unit is purchased. And the
6 ownership documentation, title, statement of origin, whatever it
7 is, is held by the lender. And that specific amount of money is
8 held against that unit until the unit is sold. When the unit's
9 sold, then that money comes back in against the line and then
10 obviously repeats itself on a regular basis.

11 But in order to monitor that, I think most floor plan
12 arrangements -- they're sending people out to count cars, if you
13 will, or count equipment probably every 30 to 60 days to make
14 sure that dealer is remitting as he's selling the car, remitting
15 that money back to them on that specific unit.

16 Q. Have you been directly involved in SBA loan guarantees
17 wherein there was an existing loan on something unrelated to
18 floor planning and then you also had a floor planner that was
19 out there who was loaning money to a car dealer or computer
20 dealer?

21 A. As an SBA loan?

22 Q. Yes.

23 A. No.

24 Q. How about like in this case where you've got the SBA loan
25 and you've also got Ford Motor Credit out there? Have you seen

1 those situations in your bank?

2 A. No, I guess I can't say that I've experienced --
3 experienced it with SBA. We as a bank loan money to equipment
4 dealers, for instance, which is very similar to a car dealer
5 where we knew in this case John Deere Credit had a floor plan
6 agreement with a John Deere dealer, yet we loaned operating
7 money to that dealer knowing full well that there was a first
8 lien mortgage holder in the -- I'm sorry, first lien chattel
9 holder in the equipment that was on the lot. That was part of
10 the -- just part of the deal, part of the understanding.

11 Q. So you knew if you ever had to try to collect on your loan
12 John Deere would still be ahead of you relative to the parts and
13 equipment that they had sold to that dealership?

14 A. Exactly. They always took a blanket filing on all parts,
15 inventory, and contract rights, so forth and so on.

16 Q. Like in that case you talked about with your bank, if you
17 took a priority interest to John Deere Credit, for example,
18 would you anticipate that John Deere Credit would finance
19 equipment and parts to that dealership?

20 A. No, they would not.

21 Q. Did you see -- as you looked at all the documents in this
22 case, did you see anything that led you to believe that any of
23 the -- that Mr. Mathiasen or Mr. Geiger who's one of the owners
24 of the bank, any one of those officers, did they do anything
25 improperly that you saw in this case?

1 A. No, I didn't note any improper actions on their part.

2 Q. Did you think -- and we'll get to Mr. Lucken's involvement,
3 but I'm talking about prior to Mr. Lucken's involvement, did you
4 see any actions they took pr -- well, actually let's just --
5 let's even back it up to summer of 2011. In summer of 2011, up
6 to that point, had you seen anything relative to the Dirks Motor
7 Company loan that they had done improperly?

8 A. No.

9 Q. Or not customary?

10 A. Everything that I reviewed from the bank's perspective was
11 within the boundaries of usual and customary business practices.

12 Q. And are you aware that -- were you aware if Mr. Dirks or
13 Dirks Motor Company was having challenges in 2011?

14 A. Yes. It was obvious that the dealership had struggled for
15 a couple of years.

16 Q. And there's been testimony in this case about the concept
17 of being out of trust, and we talked about -- I don't have to
18 have you explain that. I think the jury's well aware what it
19 means by this point. But how significant is that?

20 A. It's very significant obviously. The trust of the -- trust
21 is a huge issue between lenders and borrowers, and when one
22 sells equipment out of trust and basically is selling the unit
23 and using the money for something other than paying down the
24 note, it certainly erodes that trust big time. So yeah, it's a
25 huge issue.

1 Q. I think there's an exhibit that was Exhibit 138. I'll just
2 pop it up to make sure my memory is accurate. And I guess I am
3 accurate. That's good. July 14, 2011, and that was a letter
4 from Sterling Crim to Dirks, Mr. Dirks, saying, "Thank you for
5 your request, but we're not going to loan you any more money."
6 Did you see that letter in your review?

7 A. Yes, I reviewed that document.

8 Q. And did you see that comment about loan limits? It'd be in
9 the first paragraph where he says -- at the end of the sentence
10 he says, "We have reached -- we have reached our current loan
11 limit to one borrower."

12 A. Yes.

13 Q. And what does that mean?

14 A. It can mean several things, but I'm assuming that at this
15 point they're saying that their in-house lending limit has been
16 reached with one borrower. All banks have lending limits within
17 their banks. Some are regulated. Some are based upon capital,
18 but some are just internal lending limits where they establish
19 with any specific type of loan or customer they'll go to a
20 certain level and then that's as far as they'll go.

21 Q. Would that have -- I'm going to jump ahead to when Ford
22 Motor Credit was paid off through the use of Mr. Lucken's funds.
23 Would the loan limit have changed relative to Ford Motor Credit
24 being paid off?

25 A. I don't think so, no.

1 Q. Okay. Are you aware that then as we move forward from July
2 14, 2011, that by September Ford was taking cars back and
3 selling cars?

4 A. Yes. I believe Ford basically took all the inventory out
5 at one point and sold that inventory at auction, what was left
6 at that time, so . . .

7 Q. I want you to look at -- I think it's Exhibit 27. And
8 that's been discussed as an internal memo in the bank
9 downgrading the Dirks Motor Company loan. Do you see that?

10 A. Yes.

11 Q. And we've talked with Mr. Mathiasen. I think we've talked
12 with Mr. Crim about this. There's three bullet points. Did you
13 see anything in here -- and they've also taken that charge. Do
14 you know what that is?

15 A. I'm pretty sure it's the unguaranteed portion of the SBA
16 loan.

17 Q. Well, that's what it says, but is there anything else that
18 you can add to that beyond what the document says?

19 A. Well, when you're in a workout -- a stressed loan
20 situation, a workout situation, on a guaranteed loan
21 irregardless of what agency guarantees it, it's pretty usual and
22 customary when you think there's going to be issues that you
23 charge off that unguaranteed portion because that's what you're
24 at risk for.

25 Q. Is that an internal charge-off that you're doing?

1 A. That's internal, absolutely. It's no longer on the books,
2 but it's still an asset of the bank.

3 Q. Did you see anything at this point on September 29, 2011 --
4 when the bank is taking these actions of they're downgrading the
5 loan, they're charging off that portion -- the unguaranteed
6 portion of the SBA loan, and it looks like they're starting a
7 plan to exit the loan, do you see anything improper about what
8 was decided to -- 10 to 0 at that meeting?

9 A. No. I think the bank was acting in a very usual and
10 customary manner the way they handled the situation.

11 Q. By the way, if in the course of exiting a loan, in this
12 case exiting an SBA-guaranteed loan, if the debtor somehow comes
13 up with some money, whether it's family, friends, sells
14 something, and he or she has been in arrears on the loan and now
15 brings it current, what typically would you as a banker do at
16 that point? Would you continue with the foreclosure
17 proceedings, or would you stop given that they've now caught the
18 payments up?

19 A. Well, I think taking a step back, normally in a work out
20 loan situation where you're not willing to loan any further
21 dollars to the operation, you explain to the customer that their
22 options are to sell out and pay the loan down or to inject
23 capital by whatever means they can. More frequently than not
24 the capital normally comes from a relative or someone that is
25 known, and sometimes it's trade-offs. Sometimes the capital

1 becomes part -- the person providing the capital becomes part
2 owner in the business or whatever. There's all kinds of
3 arrangements that can be made. But in short you certainly -- if
4 you can avoid the foreclosure on the business by whatever means,
5 you try and do that. And if additional capital's offered, then
6 it would seem to be in the best interests of the customer and
7 the bank to try and make it work so . . .

8 Q. And if they -- if they're able to bring -- under SBA loan
9 guidance, are you further restricted with how you can follow
10 through with closing down the business?

11 A. I don't think SBA's restrictions differ much if at all from
12 what normal procedure would be in a banking business. It's
13 pretty standard stuff.

14 Q. Which is -- if I understand you, which means basically if
15 you can avoid foreclosure, do that.

16 A. Well, sure. SBA is simply a guarantor. They provide no
17 money. They're just guaranteeing the loan as provided by the
18 bank. So most of the time, the vast majority of the time, as
19 long as the bank's consulting with them and telling them what's
20 going on, SBA's going to say, yeah, you handle it in your way.

21 Q. Were you present for Mr. Crim's deposition in this case?

22 A. I was not.

23 Q. Were you present for Mr. Lucken's deposition?

24 A. I was.

25 Q. And are you aware that the bank's position via Mr. Crim is

1 that no floor planning was promised in that meeting?

2 A. That's -- yeah, I think that's been documented.

3 Q. And you understand Mr. Lucken's testimony that -- of the
4 two \$250,000 injections? Do you understand that, that that's
5 what he said?

6 A. Yes, I do.

7 Q. Did you see in your review of this bank file and any other
8 documents, whether it's Ford Motor Credit documents, the bank's
9 file, did you see any document that supported -- that supported
10 Mr. Lucken's testimony that he -- of this plan where if he did
11 these two \$250,000 injections then Heritage would do a floor
12 plan?

13 A. I saw nothing that would indicate that Heritage had backed
14 up on their original letter denying any further credit
15 extensions to Dirks Motor.

16 Q. And given that Mr. Dirks had -- was having issues
17 attempting to obtain floor planning throughout -- throughout all
18 of 2011, what alternative did he have in order to buy cars?
19 Once Ford -- we know Ford Motor Credit was paid off. Once that
20 happened, how was he going to buy cars?

21 A. Obviously it would be very difficult. And again, it would
22 depend on someone either providing the capital for him with a
23 direct injection of capital or borrowing money for him in order
24 for him to accomplish that. He'd been -- I believe that the
25 documents indicated that he'd been to four or five different

1 banks or other financial people trying to get a floor plan and
2 was denied at all -- all turns. So his options were very
3 limited.

4 Q. In that context with limited options, do you find whether
5 or not the line of credit that was established by Mr. Lucken to
6 be customary or not customary in terms of how he then was able
7 to obtain cars?

8 A. I don't know that it's customary to set up the line of
9 credit, although it's an option. I think in a lot of cases when
10 capital comes in, it comes in in the form of cash directly to
11 the individual in the business. But in this particular case
12 apparently the choice was to set up the line of credit at the
13 bank and to secure it with cash collateral.

14 Q. And at that -- up to that point of that line of credit
15 being set up, had you seen numerous documents where Mr. -- where
16 Mr. Dirks was talking about the possibility of getting floor
17 planning including with GM Financial but nothing materialized?

18 A. That's correct. As I said, he applied to several financial
19 institutions as well as GM, and they all turned him down.

20 Q. From what you could see from the file, do you think that
21 Mr. Dirks had any other options but seeking private financing?

22 A. Not that I could see, no.

23 Q. Is it normal when -- well, strike that.

24 I'm going to have you look at just Exhibit 46 which is
25 the promissory note that Mr. Lucken signed on January 19, 2012.

1 And we're just showing the top part of it to you.

2 A. Okay.

3 Q. As you see this, is this a standard promissory note?

4 A. Yes.

5 Q. When I say that -- you're up in Minnesota -- are promissory
6 notes pretty standard from state to state?

7 A. They don't deviate much, no.

8 Q. And as you see this, is it an actual form that you print
9 off your computer?

10 A. Yes.

11 Q. And as we see it and it gives -- like it gives the loan
12 amount, gives -- up in the top right it repeats it, in this
13 portion on the far right. We talk about this as a line of
14 credit. Sometimes people talk about revolving lines of credit.
15 Is there a difference between that?

16 A. Not materially. This is a revolving line of credit I
17 believe.

18 Q. What is that?

19 A. It's an open-ended revolving line of credit. In other
20 words, it can be advanced against, paid down, and then
21 readvanced. So it can flow up and down.

22 Q. And if we go back to the full document and then go down to
23 the bottom, and it says -- by the way, it says that it's to be
24 used for operating expenses. Do you see that on this section
25 right here?

1 A. Yes.

2 Q. That I've blocked out?

3 A. Yes.

4 Q. In your estimation as a banker, when it says operating
5 expenses, would that encompass the purchase of cars?

6 A. It certainly could.

7 Q. And, in fact -- oh, before I do that, it also -- before I
8 move on, it also says here's what the security for this loan is.
9 Is that typically that you would see that, a box that would have
10 that security?

11 A. Yes.

12 Q. And it would say what the -- what's going to secure that
13 loan.

14 A. It is the primary security for the loan.

15 Q. And this is signed by the Luckens?

16 A. Yes.

17 Q. Both in their individual and trustee capacity?

18 A. Yes.

19 Q. Now I want you to also look at Exhibit 50. And this is
20 Mr. Crim on January 23, 2012, saying if you concur, please sign
21 this letter. Then if we go to the letter on the next page --
22 we'll blow that up -- that's the attachment, and there's been --
23 multiple folks have testified that 2011 -- woops -- 2011 is
24 wrong, that it should be 2012. So let's view that as January
25 18, 2012.

1 A. Okay.

2 Q. Did you read this letter?

3 A. I have reviewed the letter, yeah.

4 Q. Why would that letter -- or strike that.

5 Does this letter explain the con -- both the
6 assignment of the CD and the promissory note?

7 A. I believe it does.

8 Q. Would it be normal to have this letter accompany a
9 promissory note and an assignment of CD?

10 A. No.

11 Q. Why do you think -- what's the value to having it here, to
12 have written that letter?

13 A. Well, I think it's a letter outlining the understanding
14 between the borrower and the bank relative to lending to Dirks
15 Motor Company where the funds are being directed towards Dirks
16 Motor Company. The bank is just saying you're giving your
17 permission, and I believe it says the trust agrees that any
18 request for advances via electronic or paper on behalf of Dirks
19 Motor Company may be funded from the line with no further notice
20 of the trustee.

21 Q. What's the p -- I think I've talked about every sentence in
22 there, but now you get to talk about that sentence. I've never
23 talked about that one. Why did you talk about that? What is
24 the significance of that?

25 A. Well, it clearly states that Mr. Lucken and trust are

1 giving permission to the bank to advance on any request from
2 Dirks Motor Company.

3 Q. So the bank doesn't have to every time -- if it was a car,
4 whatever it was, they don't have to every time call the trustees
5 or the individuals and say, Mary or John, can Dirks purchase
6 this vehicle or he needs -- it also says it can be used -- it's
7 primarily for autos, but also that means also for other things
8 too. They don't have to call him; correct?

9 A. Correct.

10 Q. All right. And then below it says that --

11 MR. REINSCHMIDT: If you'll just highlight the "in the
12 event" sentence.

13 Q. It doesn't talk about a deal between Heritage and Lucken or
14 Heritage and Dirks, does it?

15 A. No.

16 Q. And what did you understand the deal was from the review of
17 the documents between the trust and Dirks Motors?

18 A. What did I understand that sentence to --

19 Q. No, what'd you understand -- yeah, what'd you understand
20 the deal was that's alluded to in that sentence?

21 A. Apparently there existed an agreement between the trust and
22 Dirks -- and Dirks Motors and if that was going to change, that
23 the bank would be notified of any change in writing.

24 Q. Do you -- have you ever done lines of credit where it is
25 for the benefit of a third party such as in this case Dirks

1 being the third party?

2 A. Yes.

3 Q. And when has that happened?

4 A. The one that comes to mind I guess was a -- it was a farm
5 situation. A son was operating the farm, and the father stepped
6 in and did a line of credit under his name, and the advances
7 were done for the benefit of the son who was operating the farm.

8 Q. Did you do -- in your case, the instance you gave with your
9 bank, did you do anything comparable to this letter in addition
10 to the promissory note?

11 A. Yes. We had a letter of understanding with the father that
12 the note was his and it was his responsibility to pay it and
13 that he was giving up any rights of monitoring, if you will, the
14 advances. The bank was honoring advances at the request of the
15 son.

16 Q. And why did you ask like in that case for the father to
17 give up the rights to monitor?

18 A. Well, what we were asking him to do is so that we didn't
19 have to notify him every time the son came in and needed an
20 advance we didn't have to send him a notice indicating what it
21 was for and so forth. And he agreed to that provision.

22 Q. So would it be fair to say that that would be a cautious,
23 conservative thing for a bank to do to add -- to have this
24 add-on so there was no misunderstanding?

25 A. Yeah. Certainly need to err on the side of conservatism in

1 that sense.

2 Q. As you read that letter, do you have any confusion or
3 misunderstanding as to what this line of credit was to be used
4 for?

5 A. No. Seems pretty clear to me.

6 Q. You're a banker of 40 years.

7 A. Yes.

8 Q. That being said, do you think that the promissory note was
9 very clear regardless of whether one is a banker or not?

10 A. Absolutely. I'm assuming that these types of notes are
11 pretty universal and that they're signed all the time. Now, are
12 they read thoroughly? Maybe not. But certainly the
13 obligation's there, and people are well aware of their
14 obligation after they sign a note.

15 Q. And these are the same -- the promissory note we looked at
16 earlier, are those promissory notes you give to your customers
17 on a daily basis?

18 A. Absolutely.

19 Q. Or did before you retired?

20 A. Did, yeah. Couple of years ago.

21 Q. Would there be -- and I think I may have asked you this
22 earlier, whether or not a CD would be a normal -- normal or --
23 collateral for a promissory note.

24 A. Oh, certainly. It's not out of the ordinary.

25 Q. Did you see in this case -- and we've talked about it at

1 some length in this case -- that prior to Mr. Lucken's purchase
2 of that CD there was a request for Mr. Crim for financial
3 documents from Mr. Lucken? Do you remember that?

4 A. I guess I don't recall that.

5 Q. Would there be a necessity for financial documents if he
6 was going -- if Mr. Lucken was going to purchase a CD?

7 A. No, not just for the simple purchase of the CD you wouldn't
8 necessarily require those documents.

9 Q. Right. And could the bank, in this case Sterling Crim,
10 could they have alerted Mr. Lucken's -- Mr. Lucken with more
11 information than they knew about Mr. Dirks to alert him as to
12 the -- maybe more clarity on Dirks' financial situation?

13 A. At this point you're getting into some pretty stringent
14 privacy laws that banks must adhere to. That's federal
15 regulation. Without Mr. Dirks' written permission, no, it would
16 be not advisable to discuss his situation in any way with a
17 third party.

18 Q. Did you see -- as you looked at the file, did you see any
19 due diligence that Mr. Lucken took to ensure that the risk he
20 was taking was -- at least he knew what the risk he was taking;
21 whether it was a high risk or low risk, he knew what he was
22 getting into?

23 A. No. Amazingly, I saw nothing that would indicate that
24 there was any due diligence done prior to the advances.

25 Q. Did you see anywhere in the documents -- there's been

1 reference by Mr. Lucken throughout this case to a phrase backup
2 collateral. Did you ever see that phrase appear in any
3 documents, correspondence, or e-mails?

4 A. No. It's quite clear in my opinion that the CD was the
5 collateral for the note. There was never any mention of any
6 backup.

7 Q. Like, for example, you as a banker, if you were throwing
8 out terms to a borrower, is that a term that you would throw out
9 as backup collateral, or what would you typically say as a
10 banker if it wasn't primary?

11 A. No. I don't think we use backup collateral as a term.

12 Q. What would your term be if it was secondary?

13 A. Well, to give you an example of -- in commercial lending I
14 think it's very customary that you file a UCC agreement which in
15 banker terms becomes a boilerplate agreement in which you take
16 collateral on everything you possibly can. You take a
17 collateral position. In some instances that collateral position
18 may be in a second position, and you might consider that as
19 backup collateral in a sense that you're not holding primary
20 position, but at the same time you still have an interest, a
21 security interest, in that collateral.

22 Q. If this CD was going to be secondary collateral, how would
23 it have been designated?

24 MR. LAWRENCE: Objection, Your Honor. Leading.

25 THE COURT: Rephrase the question, please. Sustained.

1 BY MR. REINSCHMIDT:

2 Q. Is there -- how would you -- how would you -- if you were
3 going to have something as security on that promissory note
4 that's not primary -- primarily securing that promissory note,
5 how would you designate it? What would you call it, or what
6 would you file?

7 A. Well, number one, when you're designating security on a
8 promissory note, you're very specific as to what the security
9 is. Now, the filing may encompass more than what's designated
10 on the note in the sense that if you're taking all farm chattel
11 assets, for instance, on a farm debt, you readily acknowledge
12 that there may be a combine or a tractor that John Deere's
13 financing and they hold first mortgage secured purchase money,
14 first mortgage security interest in that property, and you are
15 in a second position on that which entitles you to any equity
16 obviously if the equipment's sold once they're paid off any
17 other value. So I suppose you could count that as backup
18 collateral, if you will, terminology.

19 Q. But again, as you look at the portion of the promissory
20 note where it says assignment of CD, as you look at the Exhibit
21 48 which -- where there's the actual assignment of the CD, is
22 there anything there that is incomprehensible or one can't
23 understand that this CD is being assigned to secure this note?

24 A. I can't see how that could be misinterpreted I guess. It
25 is what it is.

1 Q. Would -- I mean, I think we've walked through essentially
2 as we've gone through and summarized some of your conclusions.
3 But what conclusions did you reach within a reasonable degree of
4 certainty about this -- about this case, about Mr. Lucken's
5 actions, Heritage's actions, and Dirks' actions?

6 A. I think in my disclosure some of the key issues here that I
7 pointed out was that I think Mr. Lucken's involvement in the
8 situation became -- it was a result of a direct conversation
9 with Mr. Dirks. The bank had nothing to do with the origination
10 of that agreement if their agreement existed. I know that
11 Mr. Lucken took great pride in being a benefactor for his
12 community and was trying to save the business. The basis of his
13 involvement in this was his desire to save Dirks Motor Company
14 from going out of business.

15 MR. LAWRENCE: Objection, Your Honor. 703.

16 THE COURT: Overruled, but, you know, he's testifying
17 on a narrative now because you asked a compound question with
18 five different parts to it. So why --

19 MR. REINSCHMIDT: I'll break it into more questions,
20 Your Honor, quickly.

21 BY MR. REINSCHMIDT:

22 Q. So you've said one was that he -- that he had a
23 conversation with Mr. Dirks; secondly, that he was a benefactor
24 of the community. What other conclusions did you reach?

25 A. Well, I think the primary conclusion was that the bank was

1 in foreclosure when Mr. Dirks stepped into the act, and the bank
2 stopped that foreclosure at the request of Mr. Dirks and
3 Mr. Lucken on the promise that there was going to be capital
4 injected into the business, and there was. Effectively the
5 payment to Ford Motor Credit had to happen because Ford Motor
6 Credit was in the process of foreclosure of the business and
7 seizing assets. So without that, the business failed. So to
8 the point wanting to save the business, Mr. Lucken's funds went
9 to pay off Ford Motor Credit and inject money into the operating
10 account.

11 So from -- from the inception I think the objective of
12 Mr. Dirks and Mr. Lucken was to save the dealership, and they
13 hoped to do that with the injection of cash.

14 If I'm a banker and sitting in the chair --

15 THE COURT: Yeah, this is narrative, so -- but let
16 me -- I normally don't ask questions. But you said the bank was
17 in foreclosure. That's ambiguous. You don't mean the bank was
18 in foreclosure. The bank was --

19 THE WITNESS: No, no. I'm sorry. I'm sorry, sir.

20 THE COURT: -- proceeding with foreclosure.

21 THE WITNESS: The bank was foreclosing on the
22 business, yeah.

23 THE COURT: Yes. Thank you.

24 MR. REINSCHMIDT: Thank you, Your Honor.

25 BY MR. REINSCHMIDT:

1 Q. Well, let me ask you a last question, and that is, could
2 Mr. Lucken have taken efforts -- I'm talking about the line of
3 credit now.

4 A. Okay.

5 Q. And the line of credit with the letter says Dirks can draw
6 on this for the primary reason to purchase automobiles. Could
7 Mr. Lucken have taken any legal steps to protect himself for
8 that? Are there any documents he could have filed?

9 THE COURT: Now you're compound --

10 MR. LAWRENCE: Objection, Your Honor.

11 THE COURT: You're compound questioning again.

12 MR. REINSCHMIDT: I'm sorry, Your Honor.

13 MR. LAWRENCE: Objection, Your Honor. In addition to
14 being compound, exceeds the scope of the expert disclosure.

15 THE COURT: Sustained.

16 MR. REINSCHMIDT: That's all I have, Your Honor.

17 THE COURT: Thank you. Why don't we all take a
18 stretch break, and then we'll have the cross.

19 Thank you. Please be seated.

20 Mr. Lawrence?

21 MR. LAWRENCE: Thank you, Your Honor.

22 CROSS-EXAMINATION

23 BY MR. LAWRENCE:

24 Q. Mr. Burger, you're aware that Mr. Lucken and Mr. Dirks met
25 with Mr. Crim on November 8, 2011; correct?

1 A. I believe so, yeah.

2 Q. And you were at Mr. Lucken's deposition, so you would have
3 heard his testimony there about that; correct?

4 A. Yes.

5 Q. You haven't listened to audio of that meeting, have you?

6 A. I have not.

7 Q. You haven't watched a recording of that meeting, have you?

8 A. I have not.

9 Q. You don't know what happened at that meeting, do you?

10 THE COURT: Just a second. Are you implying that
11 there was --

12 MR. LAWRENCE: No, I'm not.

13 THE COURT: Well, why don't we clarify that.

14 MR. LAWRENCE: Okay.

15 THE COURT: Because it's impermissible to ask a
16 question . . .

17 MR. LAWRENCE: I'm sorry.

18 BY MR. LAWRENCE:

19 Q. I'll just ask you you don't know what happened at that
20 meeting, do you?

21 A. I was not present, no.

22 Q. Okay.

23 THE COURT: You're not suggesting that there was any
24 audio or video recording of the meeting.

25 MR. LAWRENCE: No, I'm not, Your Honor.

1 THE COURT: Okay.

2 MR. LAWRENCE: No.

3 THE COURT: Okay. I just want to make sure.

4 MR. LAWRENCE: Absolutely not, Your Honor.

5 BY MR. LAWRENCE:

6 Q. Would the bank be conducting itself in a usual and
7 customary fashion if it would just flat out lie to a customer or
8 a prospective customer?

9 A. No.

10 Q. Would a bank be conducting itself in a usual and customary
11 fashion if it would lie to a customer or prospective customer to
12 get them to invest in a business like Dirks Motor?

13 A. That would not be usual and customary, no.

14 Q. Now, would a bank be conducting itself in a usual and
15 customary fashion if it would make promises to a major car
16 manufacturer like Ford or GM that it knows aren't true?

17 A. Repeat the question.

18 Q. Would a bank be conducting itself in a usual and customary
19 fashion if it were to make promises to a major car manufacturer
20 like Ford or General Motors that it knew to not be true?

21 A. No, they would not be.

22 Q. Do you know if Heritage Bank made any promises to Ford or
23 General Motors based on your review of the file of this case?

24 A. I don't believe they did, no.

25 MR. LAWRENCE: Can we pull up Joint Exhibit 40. Can

1 we highlight the top part including the letterhead?

2 Q. Mr. Burger, do you recall seeing this document in your
3 review of the file?

4 A. I believe I have seen it, yes.

5 Q. Okay. And would you agree that this is on Heritage Bank's
6 letterhead?

7 A. Yes.

8 Q. And is this a letter from Heritage Bank to General Motors
9 that is a commitment to pay General Motors for the sale of
10 certain vehicles?

11 A. I believe that's right.

12 MR. LAWRENCE: Okay. And can we step out from this
13 and just blow up the two paragraphs?

14 Q. Can you take a moment to read these, please?

15 A. Yes. Okay.

16 Q. Would you agree that this letter is Heritage Bank
17 representing to General Motors that it has been asked by Dirks
18 Motor to finance Dirks Motors' purchase of new and used motor
19 vehicles?

20 A. No.

21 MR. LAWRENCE: Can we take a look at the -- highlight
22 this first sentence? Then focus on this first part.

23 Q. Mr. Burger, does this letter say, "We have been asked and
24 authorized by the above named dealer to finance the dealer's
25 purchase of new and used motor vehicles"?

1 A. I believe what --

2 Q. Does the letter say that, sir?

3 A. I'm sorry?

4 Q. Does the letter say that?

5 A. Hold on. Yes.

6 Q. Okay. Let's go to the next sentence. Does this sentence
7 say that Heritage agrees to pay GM the full invoice amount of
8 all vehicles hereafter sold to dealer in accordance with the
9 terms of the sale agreement in effect between GM and the dealer?

10 A. Yes, although I believe there's limitations in the second
11 paragraph as to amount.

12 Q. Okay. And that limitation is \$250,000 in any one week;
13 correct?

14 A. That's what it says, yeah.

15 Q. So based on this letter, Heritage is representing to GM
16 that Dirks Motor can order up to a quarter million dollars of
17 vehicles every week and Heritage will pay for it.

18 A. That's what those two paragraphs would indicate, yeah.

19 Q. Now, would it be a usual and customary banking practice --
20 strike that.

21 I want you to assume at the time Heritage sent this
22 letter to GM that it had the intent to never pay -- to never let
23 Dirks Motor order more than one quarter million dollars,
24 \$250,000, of vehicles, period, not in any one week, period.
25 Having made that assumption, would it be a usual and customary

1 banking practice to tell General Motors that it will pay
2 \$250,000 for vehicles in one week instead of that it will pay
3 for just \$250,000 in vehicles at any one time and no more?

4 A. I believe what you're referring to is the bank is limiting
5 time frame of one week for 250,000. It doesn't -- it doesn't
6 get to the limit as imposed by the limit on the face of the
7 note. It just says they cannot order more than 250,000 in a
8 week's time.

9 Q. Let me ask you this. Would it be a usual and customary
10 banking practice for the bank to not inform General Motors that
11 really Dirks Motors just has \$250,000 to use at any one point in
12 time and that Heritage won't pay for vehicles if Dirks Motors
13 has used up that \$250,000?

14 A. I don't think the bank violated any par -- I don't think
15 the bank lied to GM. They were just explaining to them,
16 outlining what they would do.

17 Q. Do you know if this is a letter that the bank wrote or if
18 this is a form letter from General Motors?

19 A. I do not -- I don't know.

20 Q. I want you to assume that this is a form letter from
21 General Motors; okay?

22 A. Okay.

23 Q. If this is a form letter from General Motors and the bank
24 intended to do something differently than what was written in
25 this form, would it be a usual and customary banking practice

1 for the bank to modify the form letter so General Motors
2 accurately knew and understood the bank's intent at that point
3 in time?

4 A. I'm not sure I understand the question.

5 Q. Would it be a usual and customary banking practice for
6 Heritage Bank when presented with this form letter to modify,
7 change the terms of the form letter to reflect Heritage Bank's
8 true and accurate intentions at the time it was completing the
9 form letter?

10 A. Normally on a form letter you don't change a provision of
11 the form letter coming from a dealership, no.

12 Q. And why is that?

13 A. I think the usual and customary way to handle that would be
14 to contact the person -- the outfit generating the form letter
15 and make modifications if need be. But I don't think you would
16 want to modify the document.

17 Q. The dealer has all the power, don't they, in this
18 situation, that either you accept the letter on their terms or
19 you don't agree to provide the financing; correct?

20 A. Define dealer. Are you talking about GM?

21 Q. I'm talking about -- I'm sorry. I'm talking about General
22 Motors.

23 A. They're selling the cars. Yes, they pretty well hold the
24 cards.

25 Q. Okay. So if General Motors requires the bank to allow the

1 purchase of \$250,000 of vehicles shipped in any one week, the
2 bank really doesn't have much room to negotiate that, does it?

3 A. Chances are not.

4 Q. Okay. Now, the opinions you gave at the end of your
5 testimony, those are all based on assumptions that Mr. Crim did
6 not promise floor plan financing to Mr. Dirks or Mr. Lucken at
7 that November 8, 2011, meeting; correct?

8 A. I find nothing that would indicate that there was any such
9 promise made.

10 Q. If Mr. Lucken and Mr. Dirks testified to the contrary,
11 that's nothing to you?

12 A. I have to believe that the bank was acting in a usual and
13 customary manner and they wrote a letter which basically denied
14 any further credit. I can't believe that they would turn around
15 and change their mind on it.

16 Q. Let me ask you this. Assume Mr. Lucken and Mr. Dirks are
17 telling the truth. Would your opinion still be valid if
18 Mr. Crim promised floor plan financing at that November 8, 2011,
19 meeting?

20 A. Based on the documentation, I can't assume that.

21 Q. I'm asking you to make this assumption just for the sake of
22 answering my question here. So please make that assumption, and
23 then tell me if your opinions would still be valid if that
24 assumption were true.

25 A. Some of the opinions would not be valid if I assume that

1 were true, but I don't.

2 Q. Which opinions would not be valid specifically, sir?

3 A. Which opinions on what?

4 Q. You just said some of your opinions would not be valid. I
5 want to know which ones.

6 MR. REINSCHMIDT: Your Honor, objection. Speculation.

7 THE COURT: Overruled.

8 MR. REINSCHMIDT: Lack of foundation.

9 THE COURT: Overruled.

10 A. Well, if the bank promised a floor plan to Dirks Motor,
11 then I guess my assumptions -- some of my assumptions regarding
12 how the bank handled themselves going forward would be invalid.

13 Q. Would your opinion that this was a deal just between
14 Mr. Lucken and Mr. Dirks be invalid?

15 A. No, I don't believe so.

16 Q. Would your opinion that Mr. Lucken was injecting capital to
17 save Dirks Motor be invalid?

18 A. No.

19 Q. So which of your opinions then would be invalid? Just help
20 me out with that. You said some of them would be. I just want
21 to know which ones.

22 A. Well, I suppose it goes to the second \$250,000 that was
23 held as collateral for the line of credit would make a
24 difference in that particular opinion.

25 Q. Okay.

1 MR. LAWRENCE: Nothing further, Your Honor.

2 THE COURT: Thank you, Mr. Lawrence.

3 Mr. Reinschmidt?

4 MR. REINSCHMIDT: Thank you, Your Honor.

5 REDIRECT EXAMINATION

6 BY MR. REINSCHMIDT:

7 Q. Mr. Lawrence asked you to assume that the bank had lied and
8 what Mr. Lucken and Mr. Dirks said is true. Let's do that. If
9 the bank had promised a floor plan to Mr. Dirks and Dirks
10 Motors, would there be documentation to support that floor plan
11 between Mr. Dirks and Heritage Bank?

12 A. Absolutely. There'd have to be.

13 Q. What kind of documentation would we have -- would you have
14 anticipated seeing in the bank's file if there had been a floor
15 plan between Heritage and Dirks Motor Company?

16 A. Well, it would be rather extensive, probably starting out
17 with a letter, a commitment letter, to issue and then the rules
18 of engagement, if you will, or the rules relative to how they
19 were going to manage that entire line of -- floor plan line.

20 Q. Did you ever see anything in the file such as -- maybe
21 those documents were never executed but even blank documents
22 that had been put together but then not executed? Did you see
23 that in the file?

24 A. There was nothing in the file that indicated there was any
25 commitment on the part of the bank to provide floor planning.

1 Q. There's been testimony in this case that Exhibit 40 that
2 you were looking at, the GM -- and we'll put that up in a
3 moment. But there's been testimony that no cars were purchased
4 by Mr. Dirks relative to that commitment until the Lucken line
5 of credit was put into place and cars were purchased on January
6 24, 2012, so nearly 2 months. As you look at that document --
7 you've just looked at that document. Now we have a promissory
8 note in place. Does that make sense or not that no monies were
9 drawn until that line of credit was in place?

10 MR. LAWRENCE: Objection, Your Honor. Exceeds the
11 scope of cross.

12 THE COURT: Sustained.

13 BY MR. REINSCHMIDT:

14 Q. Did --

15 MR. REINSCHMIDT: Let's put up Exhibit 40 for just a
16 moment, please. Why don't we just focus on the two paragraphs.
17 Can you blow that up? There we go.

18 Q. When it talks about exceed \$250,000 for vehicles shipped in
19 any one week, is that limitless? In other words, as you read
20 that and under -- you were asked to interpret that document by
21 Mr. Lawrence. Does that mean that they could purchase a million
22 dollars of cars a month times 12 so they could purchase arguably
23 12 million dollars worth of cars a year? Is that what you
24 believe that the bank committed to in that document?

25 A. No.

1 MR. LAWRENCE: Objection, Your Honor. Leading.

2 Mr. Reinschmidt is leading.

3 THE COURT: Overruled.

4 A. No, it does not.

5 Q. What do you think that means?

6 A. It means simply what it says, that they will not fund more
7 than \$250,000 for the purchases in any one week.

8 Q. So how would it -- how does that work relative to -- if
9 they're drawing on monies from the bank and Mr. Lawrence was
10 talking about whether or not is this a lie to General Motors, if
11 the bank's limit is 250 internally -- the bank has said 250 --
12 what happens when -- if Dirks had bought more than 250 in that
13 second week? So he bought 250 the first week and he bought more
14 the second week. What would happen internally?

15 A. Well, the bank established a 250 limit, and so they're not
16 obligated to go over that 250 limit at any given point in time.

17 Q. And just so I -- or so the jury understands, are cars
18 shipped and then monies wired, or typically is money wired first
19 and then a car's shipped if you know?

20 A. I'm not sure I know the answer to that question.

21 Q. Okay.

22 MR. REINSCHMIDT: That's all I have, Your Honor.

23 THE COURT: Thank you, Mr. Reinschmidt.

24 Mr. Lawrence, anything else?

25 MR. LAWRENCE: Very briefly, Your Honor.

1 THE COURT: Okay. Thank you.

2 RECROSS-EXAMINATION

3 BY MR. LAWRENCE:

4 Q. Now, this is the commitment letter to GM that we just
5 looked at. I'd like to go to the second page and at the very
6 bottom the dealer acknowledgment. I just have one question. If
7 this is Mr. Dirks' signature, would it have been reasonable for
8 Mr. Dirks as a bank customer to have believed that the bank was
9 committing itself to providing \$250,000 of floor plan financing
10 per week at the time November 25 he signed this letter?

11 A. No, I don't think so.

12 MR. LAWRENCE: Nothing further.

13 THE COURT: Mr. Reinschmidt, anything further?

14 MR. REINSCHMIDT: No, Your Honor.

15 THE COURT: Members of the jury, any questions for --
16 okay. We have some questions. So why don't we pass the
17 questions down. Thank you. Would the lawyers like to see the
18 questions?

19 (At sidebar off the record.)

20 THE COURT: Okay, Mr. Burger. There are no objections
21 to these questions, so here's the first one. How and when do
22 promissory note numbers get generated?

23 THE WITNESS: How and when do the note numbers get
24 generated? I believe they're in sequential order, and when the
25 note is generated, it's assigned a number by the computer, and

1 it's sequential.

2 THE COURT: Okay. Any follow-up questions from the
3 lawyers on that one?

4 MR. REINSCHMIDT: No, Your Honor.

5 THE COURT: Mr. Lawrence?

6 MR. LAWRENCE: Yes, Your Honor.

7 FURTHER RECROSS-EXAMINATION

8 BY MR. LAWRENCE:

9 Q. Now, you said it was sequential, but to generate that
10 number, would you need to have identified a borrower on the note
11 to generate that number?

12 A. I don't believe so, no.

13 MR. LAWRENCE: Okay.

14 THE COURT: And the second question is in regard to
15 the story of the father helping the son that you told, did the
16 father cosign a note, or did the father put money in as
17 backup -- in a backup collateral plan? And was his collateral
18 applied as an open note, or was it a CD?

19 THE WITNESS: Actually the story in question, the
20 father was of substantial means, and the line of credit we
21 established in his name was unsecured.

22 THE COURT: Okay. Any follow-up questions?

23 MR. REINSCHMIDT: No.

24 MR. LAWRENCE: No, Your Honor.

25 THE COURT: Okay. I normally don't ask questions, but

1 I can't help myself here. So how long have you been in Luverne?

2 THE WITNESS: I've been in Luverne for 30 -- 30 plus
3 years, 35 years almost.

4 THE COURT: Okay. Do they still talk about the 1964
5 state boys basketball team that beat Rochester in the state
6 finals?

7 THE WITNESS: I hate -- I hate to say this, but --

8 THE COURT: I'm sure they do.

9 THE WITNESS: -- my daughter is married to the son of
10 one of those individual players, so yes, it gets discussed
11 quite --

12 THE COURT: Well, I was at the game, so I remember.

13 THE WITNESS: Were you really?

14 THE COURT: I was 14. Yeah. So -- but it's a -- you
15 know, it's a small town. They actually had great success from
16 that part of the state. I think Edgerton won it in 1960, and I
17 think Marshall won it in maybe '62 or '65.

18 THE WITNESS: Actually I think Edgerton won it twice.

19 THE COURT: Twice, yeah. Okay. Great. I was from
20 the Twin Cities but played high school basketball. So thank you
21 very much. You're excused.

22 MR. REINSCHMIDT: I don't have any further questions.

23 THE COURT: Okay. I was going to -- yeah, right,
24 right, right, right. I was trying to remember the players on
25 the team, but that's way beyond my memory.

1 THE WITNESS: A couple of them are gone now.

2 THE COURT: Yeah, I imagine. Right.

3 Okay. Mr. Reinschmidt, does the defense have any
4 additional evidence?

5 MR. REINSCHMIDT: No, Your Honor. We rest.

6 THE COURT: Okay. And are the plaintiffs planning on
7 any rebuttal testimony?

8 MR. THOMPSON: Yes, Your Honor.

9 THE COURT: Okay.

10 MR. THOMPSON: John Lucken.

11 JOHN LUCKEN, PLAINTIFFS' WITNESS, PREVIOUSLY SWORN

12 THE COURT: Okay. Mr. Lucken, you're still under
13 oath, so you can just resume your position in the witness box.

14 THE WITNESS: Yes, Your Honor.

15 THE COURT: Mr. Thompson?

16 MR. THOMPSON: Yes, Your Honor.

17 REBUTTAL EXAMINATION

18 BY MR. THOMPSON:

19 Q. Good morning, Mr. Lucken.

20 A. Good morning, Stan.

21 Q. Mr. Crim said that he thought the reason why you went to
22 Heritage Bank instead of going to Peoples Bank is because you
23 didn't want Peoples Bank to know you were doing business helping
24 out Mr. Dirks. Did you hear that?

25 A. Yes, I did.

1 Q. Was that true?

2 A. Absolutely not.

3 Q. Would you have any reason not to have Peoples Bank know
4 that you're helping out Dick Dirks?

5 A. No.

6 Q. Mr. Crim talked about the line of credit, and there were
7 two instances when it went over the limit. Once it went up to
8 515,000, and once it went up to 265,000. Were you ever notified
9 by Mr. Crim or the bank either in writing, e-mail, or otherwise
10 that that had occurred?

11 A. Not at the time I wasn't. I wasn't aware of it, no.

12 MR. THOMPSON: Nothing further.

13 THE COURT: Thank you, Mr. Thompson.

14 Mr. Reinschmidt?

15 REBUTTAL EXAMINATION

16 BY MR. REINSCHMIDT:

17 Q. Just a moment, sir. I'll just be quick. When you say you
18 were not notified about the increase in the line of credit,
19 again, during that time -- I think that was in the March, April
20 of 2012 -- you were getting in -- you were getting statements
21 each month beginning after the line of credit was put into place
22 in January of 2012; is that correct?

23 A. I was.

24 Q. And I think your testimony on Monday of this week was that
25 either you -- either you opened them and just gave them to

1 Mr. Dirks or you simply wouldn't even open them, you would just
2 give them to Mr. Dirks; is that correct?

3 A. Correct.

4 MR. REINSCHMIDT: That's all I have, Your Honor.

5 THE COURT: Thank you.

6 Anything further, Mr. Thompson?

7 MR. THOMPSON: No, Your Honor.

8 THE COURT: Okay. Thank you. Members of the jury,
9 that concludes the evidence, so here's what we're going to do.
10 Here's what we have remaining. We have remaining the closing
11 arguments and then one final instruction from me and the verdict
12 form. And it's always my practice to give the lawyers a break
13 to get ready for their closing arguments. I find that if I give
14 them a break the closing arguments are actually shorter rather
15 than longer. So we'll come back at 10 minutes to 11 for the
16 closing arguments of the lawyers.

17 Just -- I don't think I told you this, so I'll let you
18 know that because the plaintiff has the burden of proof in a
19 civil case, the plaintiff gets to go both first and last in the
20 closing arguments. So there will actually be three, from the
21 plaintiffs, from the defense, and then what's called a rebuttal
22 closing argument from the plaintiff. So we'll see you back here
23 at 10:50. Thank you.

24 (The jury exited the courtroom.)

25 THE COURT: I always bake cookies for the jury on

1 their last day. Anything we need to take up? Let's -- let's --
2 the Rule 50 motion will be deemed having been renewed at the
3 close of the defense case and same ruling, reserve ruling. Any
4 other record anybody needs to make? Anything we need to talk
5 about?

6 MR. REINSCHMIDT: No, as long as -- and we're just
7 going to be filing a brief tomorrow I believe.

8 THE COURT: Right. Yeah. Okay. Great. Thank you.

9 MR. THOMPSON: No.

10 THE COURT: Thank you.

11 (Recess at 10:21 a.m.)

12 THE COURT: Everybody ready?

13 MR. THOMPSON: Yes, Your Honor.

14 MR. REINSCHMIDT: Yes, Your Honor.

15 THE COURT: Shall we wait for Mr. Cross?

16 MR. REINSCHMIDT: Sure. If I can't find him in 30
17 seconds, we'll just start, Your Honor.

18 THE COURT: Okay.

19 MR. REINSCHMIDT: I can't find him. Let's just start,
20 Your Honor.

21 THE COURT: We can wait another -- we can wait till
22 ten of if you want. It's up to you.

23 MR. REINSCHMIDT: What time is it right now?

24 THE COURT: We've got another minute.

25 MR. REINSCHMIDT: Okay.

1 THE COURT: Let's wait another minute.

2 MR. REINSCHMIDT: Okay. Let's wait that, and
3 hopefully he'll be here.

4 THE COURT: Okay. Let's have the jury brought in.
5 Thank you.

6 (The jury entered the courtroom.)

7 THE COURT: Thank you. Please be seated.

8 So I do want to tell you a funny story about the
9 cookies. So I didn't leave the courthouse till about six last
10 night. By the time I got home and made dinner and did some
11 reading I needed to do, I was really tired. So I made the
12 cookies. I made them, you know, tons of times, and they came
13 out. They were like -- all ran together. They were super flat.
14 They were burned around the edges and the middle. And I kept
15 making, you know, more and more but out of the same batch of
16 dough that I had. Nothing was turning out.

17 So I was really tired. It was about ten at night. So
18 I ran to Wal-Mart and bought some Wal-Mart cookies. But then
19 when I got back home, I felt real guilty about passing off -- so
20 I'd actually taken the Wal-Mart cookies out of the containers
21 and got all the mismatched ones so they didn't look like they
22 were identical, and I thought, well, I'll just pass those off as
23 my own. Then guilt hit me.

24 So I went back to Wal-Mart, bought some more baking
25 stuff, and then I got up at 4:00 this morning. And I realized

1 what I had done wrong. I had left out three quarters of a cup
2 of flour, and that's why they were -- I like them real flat, so
3 you put in a little bit less flour, a little bit more butter.
4 But I really screwed it up, and I was so embarrassed to call my
5 wife and asked her what I did wrong, and then I finally figured
6 out that I had misread the flour so . . .

7 JUROR EPPINGA: They taste good.

8 THE COURT: Well, I hope you enjoy them. A lot of
9 sweat equity went into them. I don't know if they're any good
10 or not. But just goes to show you can screw up something you've
11 done a zillion times, you know.

12 Okay. Mr. Thompson, are you ready to proceed?

13 MR. THOMPSON: I am, Your Honor.

14 THE COURT: Okay.

15 MR. THOMPSON: Good morning. I want to thank all of
16 you for your service. I know some of you may have driven a long
17 way to be here. I know you've been here early because I've seen
18 it. And I know you've been attentive. You've been engaged.
19 You've asked questions, and I appreciate that. And I know John
20 Lucken does too.

21 At times some of this evidence may have been tedious,
22 and I apologize if you thought it was. Hopefully I can tie that
23 together for you, put all these pieces of this puzzle together.

24 One of the tedious parts was I read a stipulation
25 about Mr. Crim. And here's why that's significant. It said

1 every act that he took in this case was in the scope of the
2 employment with the bank. And what that means is anything he
3 did the bank did. And whenever you're reading the instructions
4 that said the bank did this or the bank had to do that, you can
5 insert Mr. Crim's name for it, and it means the same thing.

6 Now, what happened? This is actually I think the
7 pretty simple part of the case. Crim told Dirks what the bank
8 needed. Not going to go over all the -- pay off Ford, get a
9 backup CD. Dirks gets ahold of Lucken, tells him that.

10 Lucken says, "Let me think about it. I want to talk
11 to the banker." They talk to the banker. The banker says the
12 same thing.

13 November 8 meeting, Crim said, "John, if you provide
14 5 -- 250,000, pay off Ford, rest can go to Dick, put up a
15 250,000 CD as backup collateral, the bank will provide floor
16 plan financing." That's what John said.

17 How about Dick Dirks? I thought he was a very strong
18 witness. He sat right there at 89, and he recalled those events
19 like they happened yesterday. Think about that when you
20 deliberate. Judge his credibility as a witness. I welcome it.

21 Now, Crim told a lie at that meeting. I'm not going
22 to sugarcoat it. He flat out lied. And what happened after he
23 lied at that meeting? Well, John did what he was supposed to
24 do. November 17, he puts up his quarter of a million dollars to
25 pay off Ford. The rest goes to Dick.

1 A week later he buys that CD, puts up his 250,000 for
2 that. He's done what he was supposed to do -- page 1, please --
3 just like he's supposed to do in the notes from that meeting,
4 just like Dick told him at the meeting, just like Crim told him
5 at the meeting, and then he performed.

6 So by November 23, John Lucken did everything he was
7 supposed to do. And what did Crim do?

8 Two days later, two days later, Exhibit 40 tells you
9 what Crim did because on the second page, the second page, we
10 know the dates of it. It's dated November 25 for Crim's
11 signature and the same date for Dick Dirks' signature. Think
12 about that. John performs by the 23rd. Two days later this
13 commitment to GM comes out. Not only does it come out, but Dick
14 Dirks signs it that day, November 25. Dick read it and signed
15 it, and what did Dick read?

16 Let's go to page 1, second paragraph, please.

17 What did Dick read? Dick read that the bank was going
18 to provide him \$250,000 a week in floor plan financing just like
19 Crim had told him, just like Dick had told John, just like Crim
20 had told John and Dick. Dick was probably like, ba da boo, ba
21 da bing, I am back in business. And who wouldn't think that if
22 you read that letter?

23 And even Crim, even Crim, said, yeah, 250 per week
24 means if Dirks bought 250 in week 1 and in week 2 he bought
25 another 250, yep, we'd have to pay 500,000. Same in week 3.

1 Don't let anybody fool you that this letter has a
2 period after 250,000. I know some people might want to put a
3 period and use some judicial whiteout there and take that one
4 week out. But that's not what was being told to people when
5 this was going down. That wasn't being told to Dick Dirks. And
6 it wasn't being told to GM. Think about that.

7 Now, for fraud, Judge Bennett has told you what those
8 elements are. And most of those are pretty simple. Did Crim
9 misrepresent that the bank was going to provide floor plan
10 financing? Sure. That's a layup. Was it false at the time of
11 the meeting? You bet. He had no intention that the bank was
12 going to put its money into a floor plan finance, no intention
13 for the bank to loan one pity -- penny. So he knew it was
14 false. And he knew it was false because he wanted to get the
15 bank out of a jam, and he could do it by using John's money.

16 Was it material what he said? Sure, it was. Sure, it
17 was. John testified if Crim would have said at the meeting,
18 hey, oh, timeout, bank isn't putting any money into this deal,
19 John said, well, if that's the case, neither am I. So, of
20 course, that lie by Crim was material.

21 Now we get to, one, did he know it was false when he
22 made it. I'm going to ask you -- we're going to put up Judge
23 Bennett's instruction here, and I'm going to have Rebecca
24 highlight three of these that may help you when you deliberate.

25 Number one, did Heritage actually know or believe that

1 the representation was false? I think it's overwhelming yes to
2 that one. For me that's a layup.

3 Same with number two. Heritage stated its intention
4 to do or not to do something when it did not actually have that
5 intention. Once again, for me that's a layup.

6 Now, for some of you this next one might come into
7 play. Some of you might think, well, yeah, I mean, Crim said
8 there'd be floor plan financing, but he didn't say whose money
9 it was going to be.

10 So I would ask you this if you haven't already
11 answered this one in John's favor. If you go to a bank and the
12 bank says it's going to make a floor plan loan, who in the world
13 would think the loan's going to be of your own money? You're
14 going to think the loan is from the bank's money. And that's
15 where this one comes into play. Heritage knew the
16 representation could be understood in both a true and a false
17 manner and it was made in reckless disregard. So I think we've
18 got three grounds that show he knew it was false.

19 Let's go to intent to deceive. Now, I think that's an
20 easy one too. I think the bank knew it had a bad loan and Crim
21 wanted to get the money back for the bank. I think that's a
22 very bad intention.

23 Let's contrast that with John's intention. John was
24 acting for the best of motives. He's trying to help out a local
25 business.

1 And given the lie that Crim told at that meeting to
2 get 500,000 out of John's pocket, who'd want to deal with a
3 banker like that? Who'd want to deal with a banker like that?
4 Well, apparently no one in Siouxland does because Mr. Mathiasen
5 told us he fired Crim because no one in Siouxland would do new
6 loans with him.

7 Now, this loan was a big deal to the bank. This
8 250,000 that they were looking at losing was a big deal. And
9 let's look at the Ford financing statement. And I want to
10 highlight A, B, and C. Don't be misled that it just covered
11 motor vehicles. You can see in black and white it covered
12 everything. And that's called a blanket security interest.

13 And the bottom line is that before John's money paid
14 off Ford, if Ford would have foreclosed then, Ford would have
15 had dibs to the first 225,000, and because John's money paid off
16 Ford, the bank got that first 225,000. That's where John got
17 swindled.

18 And if Ford wouldn't have paid off, I doubt the bank
19 at the end of the day would have got all of its money back. And
20 nobody at the bank would be going down to Hard Rock because of
21 their good luck on this loan.

22 Let's talk about that SBA guarantee. Now, I heard
23 Mr. Harbison, and I was thinking to myself, gosh, we should have
24 called him as a witness. He was just about as good for us as he
25 was for them. He talked about, I think, three or four

1 irregularities in the SBA loan. And whether the SBA would have
2 pulled the guarantee or not, I don't know if we know. We do
3 know from his testimony the SBA was cracking down in 2011.
4 That's what he told us. SBA was cracking down on these then.

5 But even if the SBA wasn't going to pull the
6 guarantee, that's really not our point. Our point is in the
7 mind of the banker was he worried about this? Was it a risk?
8 Was he worried that if the SBA loan got pulled the loss would be
9 even bigger?

10 Let's go to the next item we've got, justifiable
11 reliance. In the instructions Judge Bennett has told you that
12 that can be based on steps to conceal, covering your tracks
13 afterwards. He also tells you to consider the entire
14 transaction. I'm going to put up a PowerPoint, and I'm going to
15 go through these elements.

16 Here's all the reasons why there was justifiable
17 reliance: One, the bank sent that floor plan letter to GM just
18 to keep the franchise. Even Ford thought Heritage had provided
19 a floor plan. Look at Exhibit 141. The bank used the account
20 number 10881 when John hadn't even signed a loan application,
21 once again covering up their tracks when they told GM there's a
22 commitment for an account that didn't even exist, covering their
23 tracks.

24 Dirks signed Exhibit 40 on November 25, saw it, and
25 thought he had floor plan financing. Now we're hearing that he

1 didn't, once again covering their tracks.

2 Number 2, when the bank asked John to give tax
3 information, they didn't tell him what the purpose was. They
4 didn't say, hey, we're getting this to make a loan. Didn't tell
5 him that, once again covering their tracks.

6 Number 3, Crim testified that Dirks called and was
7 agitated about not getting vehicles. You bet he was. He read
8 Exhibit 40 and thought, great, I got 250 per week; I'm back in
9 business. I believe the evidence can let you infer that Crim
10 thought, hey, if Dirks isn't getting vehicles, Dirks could call
11 Lucken, and Lucken could figure out that Heritage wasn't going
12 to provide any money for a floor plan and then John, when it
13 came time to sign this CD over, would say, huh-uh, not going to
14 do it; you, bank, haven't met your commitment.

15 But they didn't let John know that. In fact, that's
16 why Crim called in a panic to tell John to come to Sioux City,
17 sign the assignment and the line of credit to get that all put
18 in place before John found out the bank wasn't going to put any
19 money in.

20 Let's go to ex -- the next one, Exhibit 50. That's
21 the letter that's backdated. Crim wanted the loan filed to look
22 like the authorization occurred prior to the assignment. In
23 fact, their own expert Welte fell for it. He testified in front
24 of you he thought the letter was signed on January 18, and you
25 all know it wasn't because he didn't even get it till the 23rd.

1 Last one, overdrafts on the line of credit, Dirks used
2 that line of credit like he had floor planning. Remember Dick
3 went up to 515,000. Well, of course, he did. He thought he had
4 250 per week because that's what the bank told him and told GM
5 in the letter he signed. Of course, he did that.

6 And the bank should have notified John and said, hey,
7 your line of credit went over by more than 265,000. Didn't tell
8 him that. And then it happened again, and they didn't tell him
9 that.

10 Steps to conceal, covering your tracks. It is all
11 over this case.

12 Let's look at credibility. I talked about the account
13 that had that number back when the line of credit was entered.
14 Crim was pretty clear there had to be a signature by the
15 customer to create the account. John didn't sign anything until
16 two months later. So how did that account come around? Well,
17 Mr. Mathiasen took the stand. Well, you know, you use the next
18 one in the chute, and maybe that's where the number comes from.

19 Let's grant him that. What would have happened, what
20 would have happened, if when Crim calls in this panic two months
21 after the line of -- or the commitment letter to GM is sent and
22 says come in and sign this line of credit and CD, and what if
23 John said, ain't going to do it, not going to do it? That bank
24 would be in a big jam because they had told GM there's an
25 account with that number, and there wasn't. That would be a

1 problem.

2 And on the first page of this floor plan financing to
3 GM, you see there's an account number. It's handwritten. I
4 mean, isn't that a little weird? Isn't that a little weird?

5 And then whenever you catch the bank in something, oh,
6 that's boilerplate. That's just boilerplate. Don't worry about
7 that. Even though it's a contract and people sign it, that's
8 just boilerplate.

9 Well, look, if you're Mr. Crim and you're talking
10 about 250,000 a week, you darn well better read your agreement.
11 And if you don't want to put 250 a week on the line, you better
12 do something. And he didn't.

13 Even Crim on the stand -- I asked him at the meeting
14 on November 8 with Dirks and John, I asked Crim, did you tell
15 them at the meeting there was no floor plan financing, and he
16 said, "No, I didn't say that."

17 So then I pull out his deposition which was his
18 testimony under oath earlier. And in that deposition he said,
19 "I did tell him at the meeting there was no bank floor plan." I
20 mean, get it straight. This guy's on both sides. Truth is he
21 did tell him at the meeting that there would be the floor plan.
22 And then he tried to get out of it in his deposition by saying
23 he didn't tell him. Then at trial he came back and said, "I
24 didn't say that at all."

25 You can think about that when you deliberate. Did it

1 cause damage? Absolutely. And the amount we're seeking is
2 500,000. Give John his money back. They lied to him. It was a
3 fraud. He wants his money back.

4 Punitive damages, punitives can be awarded if a person
5 in a managerial capacity for the bank acted in the scope of
6 employment. Layup. They stipulated to scope of employment. He
7 was the branch manager, vice president. Heritage is on the hook
8 for punitive damages.

9 And you can get punitive damages in Iowa if you have
10 reckless conduct towards an individual. Lying as a banker, even
11 as Mr. Burger said, is something you don't do. And Crim lied in
12 that meeting and said the bank would provide floor plan
13 financing. That's about as blatant, well -- wanton and willful
14 disregard of somebody's rights as I can think of.

15 There's a question you're going to be asked, was that
16 fraud specifically directed at Lucken? And once again, that's a
17 layup. Yes. I mean, that's what Crim told him at the meeting.
18 So when you get to punitive and mark yes, specially directed,
19 yes.

20 How much? Well, Judge Bennett has told you the law,
21 and you can look at the wealth of the bank. They have over 400
22 million in assets. They made 2.5 million last year.

23 Some cases talk about punitives as smart money, money
24 that makes it sting to the party that did it. And on punitives
25 you're not looking at John's injury by itself. You're looking

1 at what's going to stop that bank from doing this in the future.
2 So you go back there, you award punitive damages in an amount
3 that you think's proper.

4 The last claim we've got is tying, four elements.
5 Three of them are layups. Was there tying? Way to think of
6 tying is bundling. Has to be a tied product, a desirable
7 product. That was the floor plan. That's what John wanted.
8 There has to be a tying product, the undesirable, which would be
9 the line of credit and the CD and the letter. That happened,
10 and there's no doubt about it. Bill Tank testified to that.

11 Bill Tank also said it was unusual. That's the second
12 element. And for unusual Bill Tank said it -- and I think
13 Burger did too -- that it would be unusual to have a line of
14 credit that covered motor vehicle financing that did not give a
15 secured interest to the person that put up the line of credit.
16 John didn't get a secured interest. The bank kept its secured
17 interest. And Bill Tank said that's unusual, and I think Burger
18 said that too. So that's proven.

19 The other one is an effect -- or it could lessen
20 competition. Sure. John banked at Peoples Bank. He would have
21 rather done business with Peoples Bank. They were shut out of
22 doing this deal.

23 And to try to explain why John didn't go to Peoples
24 Bank, Crim lied again. Well, John didn't want Peoples Bank to
25 know he was doing business with Dick Dirks. Really? That's all

1 you got? What a crock.

2 The last one is was there benefit to the bank. Sure,
3 there was. The bank got a two hundred fifty dollar -- fifty
4 thousand dollar CD. They got interest on that line of credit
5 paid by Dirks. They used that CD to pay SBA payments, not to
6 buy cars, about 77,000. Dirks lost three cars he could have
7 bought and sold so Heritage could line its pockets with John's
8 line of credit.

9 And they even -- out of that 77, part of it was a
10 48,000 -- and I think we even had a juror question on that. Why
11 would a bank take that? Good question. Why would a bank take
12 that?

13 Tying damages, 250,000 for the loss of CD, and we want
14 45,000 on top of that for that life insurance policy that John
15 bought to get the assignment of it, and that money went to
16 Heritage too. John still hasn't gotten anything under those
17 policies, so don't be deceived by any arguments that those
18 policies have anything to do with this.

19 I'm going to have about five minutes left to talk to
20 you after Mr. Reinschmidt, and I'm going to sit down now. Thank
21 you.

22 THE COURT: Thank you very much, Mr. Thompson.

23 Mr. Reinschmidt?

24 MR. REINSCHMIDT: May I proceed, Your Honor?

25 THE COURT: You may. Thank you.

1 MR. REINSCHMIDT: Thank you. Well, I also was up at
2 4:00. I'm hopeful that I was working on my closing, and
3 hopefully I've put flour into my closing, so we'll see. I hope
4 so.

5 I always like to tie my closing back to my opening,
6 and in the opening I talked about that this is -- there were
7 going to be complexities in this case, but ultimately it was
8 really a simple case. It was about John Lucken loaning money to
9 Mr. Dirks and Dirks not paying that money back, Dirks having a
10 handshake with Mr. Lucken and not following through on that
11 handshake.

12 There were -- there's been so many things that have
13 been thrown out against the bank in this case up to the point of
14 that loan and during the period of that loan, things like the
15 OCC which were -- had no relevance to what happened with
16 Mr. Lucken.

17 The OCC had an enforcement action. It was handled.
18 It was terminated, and things went on fine during the course of
19 that loan.

20 We heard about the disbursement of 329,000. It was
21 fine. It was approved by the SBA. But again, they're trying to
22 pick apart everything they can because they have to try to show
23 to you, prove to you that somehow some way that something was
24 jeopardized with that SBA loan guarantee. And if it's
25 jeopardized, then it gives Sterling Crim and Heritage the

1 motivation to make a promise in November of 2011.

2 If you throw out the chaff and say no, those things
3 didn't happen or aren't relevant, the OCC, the disbursement, the
4 Ford first lien that witness after witness has said a floor
5 planner has to have first lien -- and by the way, it's a
6 misstatement to say when Ford was going to foreclose on -- and
7 try to get their 225,000, Ford was going to get stuck. They
8 weren't going to get 225,000 and take 225 from the bank.
9 That -- one of those last exhibits I showed you showed that the
10 only thing left -- the cars were gone, and this is before
11 anything with Mr. Lucken happened. The only thing left were
12 parts and equipment that Ford valued between I think like about
13 49,000 to about 62,000. That was it. That's all that was left
14 for Ford to get at.

15 I want to talk about this briefly, about this Exhibit
16 40, and then we're going to look at the two claims that they've
17 made, fraud and anti-tying. This Exhibit 40 and 41, the GM and
18 the Ford, one of the things Mr. Thompson said was, well, by
19 golly, Mr. Dirks, he knew -- he signed Exhibit 40. He knew he
20 had a floor plan when he signed that document, and off he went.
21 He didn't buy a car according to David Dirks and Dick Dirks
22 until January 24, 2012, after the Lucken line of credit was put
23 into place.

24 So if Mr. -- and let's keep this in mind. We're in
25 this courtroom. Lucken and Dirks live in Akron. Mr. Lucken is

1 driving by every day seeing there's no cars in that lot. Dirks
2 is there with no cars. He's not agitated back in November, back
3 in December, back in January until late January, and he's like,
4 it's time to get cars, get the line of credit in place so I can
5 start buying cars.

6 And the suggestion somehow that this -- that that
7 Exhibit 40 was some limitless amount of cars, it wasn't. It was
8 saying to GM, if a car's ordered, we'll pay it, but if there's
9 not enough, it will stop.

10 To me the moral of the story is when talking about --
11 like when Mr. Thompson's talking about punitive damages, the
12 moral of the story is not, you know, to sting the bank and so
13 forth. The moral of the story is if a third party -- if after
14 this case is over -- and, of course, we're asking for a defense
15 verdict in this case of zero. Even when you provide a zero
16 verdict to us as we hope for, the moral of the story is this
17 bank, if a third party ever comes along again when somebody is
18 having troubles, the bank will run from that third party. They
19 will not touch it with a ten-foot pole because they never, ever
20 want to find themselves in a position again where that -- where
21 one of those two parties said you did me wrong. In this case
22 the third party Mr. Lucken said you treated me wrong, you did
23 this, you did that even though the documents don't support any
24 of that. They just don't. But that's the moral of the story is
25 we'll deal with our debtor, and that's it.

1 Let's go ahead and just briefly look at -- briefly
2 look at some of the items here for fraud. Go through the -- if
3 we start at the very first one, and it says fraudulent
4 misrepresentation. It's -- fraud is the simple way of referring
5 to fraudulent misrepresentation.

6 And you can read that about basically that he -- that
7 Mr. Crim said that pay off Ford Motor Credit and buy a CD.

8 Well, let's talk about that. This sequence of events
9 of the timing is just critical. First of all, in that meeting,
10 you saw those notes in Exhibit 30. The million dollars that
11 Crim brought to the meeting where he said million dollars with a
12 question mark on the second page of Exhibit 30, Mr. Lucken in
13 this trial said, well, that's what -- that's what Dirks hoped to
14 get from Heritage. Then when I read him from his deposition, he
15 said, well, he didn't know what that million dollars meant.
16 Then when we went to the first page and it said \$600,000, he
17 said again that's what Dirks hoped to get.

18 And if you read throughout the summer of 2011 and the
19 fall of 2011 various exhibits, particularly Ford Motor Credit
20 exhibits, they don't have a dog in the fight in this courtroom.
21 And in this court -- so their memos talk about all these hopes
22 that Dirks had. He's a car salesman. He's hoping this will
23 happen. He's hoping that will happen. None of it materialized,
24 none of it.

25 And by the way, when we're talking about Exhibit 40

1 and Dirks was just so confident he had a floor plan in place
2 because of Exhibit 40, interestingly, Mr. Thompson talks about
3 that Dirks just had this sharp memory. But then when it came --
4 he had a sharp memory about the meeting, but then when it came
5 to, well, wait a minute, Mr. Dirks, you were looking for floor
6 planning in December of 2011, in January of 2012 talking about
7 trying to get a million dollars with General Motors, that he
8 couldn't remember. Well, if he had floor plan in place, he had
9 no reason to go out there and try to find more floor planning,
10 absolutely no reason whatsoever.

11 But let's look really quickly at the timing. So on
12 November 8, that's when Mr. Lucken says that's when these
13 promises were made, right there. But nothing happens, and on
14 November 16, 2011, which is Exhibit 139, Dirks tells Ford Motor
15 Credit, "I don't have any payment plan in place. I'm hoping
16 that I can pay you within the next ten days or so." That's
17 November 16. Then the next day on November 17, Mr. Lucken did
18 pay Ford Credit. It's Exhibit 35. He pays.

19 Well, what about the second part, the CD? Buy that
20 CD. He didn't buy it. He had the money. I mean, we can look
21 at his financials, knows he has the money. Well, okay. He just
22 doesn't get around to it.

23 Well, on Exhibit 38 Crim is asking for -- Mr. Crim is
24 asking for financials. Again, various witnesses have testified
25 you don't need financials if it's a CD.

1 On November 18, on Exhibit 140, Mr. Dirks has reported
2 to Ford Motor Credit that he's still in negotiations with
3 Heritage on a floor plan. Now, keep in mind on November 18,
4 that's 10 days after they supposedly walked out of the meeting
5 and there was a floor plan in place.

6 Oh, and that reminds me, Mr. Dirks said he didn't say
7 that he walked out of that meeting with a floor plan. He said,
8 well, I thought I probably had a floor plan with Heritage when I
9 walked out of that meeting on November 8, 2011, just like he
10 prob -- he thought a lot of probable financing was going to
11 occur in the summer of 2011, fall of 2011. And, oh, by the way,
12 in Exhibit 1027 which is the letter that Mr. Lucken drafted to
13 Dirks but didn't send -- he didn't have any legal advice at this
14 point; it's just like these are my thoughts on what happened --
15 he said, Dick, you said you'd get a million dollars in
16 financing, and you didn't do it. He didn't say you said you had
17 a million dollars with Heritage; I'm mad about that; I'm
18 agitated about that. He didn't say that.

19 Then on November 19 on Exhibit 38 and Exhibit 106,
20 Lucken gives his financials, and they're very thorough
21 financials. As Mr. Welte testified, they show that -- not only
22 do they show that he's worth a lot of money and good for him and
23 helps him be a benefactor for the community, but they're
24 organized. I mean, he knows what he's doing. This is a very
25 sophisticated, experienced businessman, and that is relevant as

1 you'll see to the elements under fraud. That's one of the many
2 elements is your level of sophistication, experience, and so
3 forth. So it's critical.

4 Finally on November 21 in Exhibit 38 -- that's the
5 ongoing e-mail with Mr. Lucken -- Crim says let's get together
6 to discuss this further. Well, again, if there's been an
7 agreement back on November 8 to buy a CD, what is there to
8 discuss? Just write me a check or wire me money. There's
9 nothing to discuss.

10 And then finally on November 23, Mr. Lucken does buy
11 the CD. Again, you heard testimony from Mr. Crim as to the CD
12 resulted in a much lower interest rate. It was a very low
13 interest rate, 3.7 percent on the note. The CD's the same as
14 cash, so that's why it was cheaper.

15 You'll note in that letter that Mr. Lucken drafted to
16 Mr. Dirks, Exhibit 1027, there's nowhere in there that he
17 laments or complains or sets forth that there was a Heritage
18 floor plan. He says nothing about that. That would be a
19 critical part of how this all -- this all went south, this deal
20 went bad; he'd be telling Dirks. And what about the Heritage
21 floor plan? There's no mention of it, none.

22 About the line of credit, John Lucken has two stories.
23 One story is the bank duped me. I didn't know what I was
24 signing. I went to the bank, and I didn't hardly talk to
25 Mr. Crim. He just said sign this, and I -- I didn't read it. I

1 didn't understand what I was signing, so I didn't even know I
2 was signing a line of credit.

3 Then the next story is I had a line of credit. Okay.
4 How do we know that that's the next story? Well, we know that's
5 the next story because as Mr. Thompson's talking about the
6 monies that were taken out of the line of credit, some monies
7 that were taken out -- we dispute how much; he said 77,000; we
8 dispute it's that much -- that were used for the line of credit
9 to pay on the SBA loan, those monies that were paid on the SBA
10 loan Mr. Lucken was aware of. And, in fact, if you recall there
11 was about \$30,000 -- there were 2 payments that totalled
12 30,000 -- Lucken had a conversation with Mr. Crim and said --
13 this was in February of 2012 and said, hey, I don't want you
14 using -- I don't want you to use money out of there for that
15 purpose. The purpose of that money is to buy cars for Dick
16 Dirks. Any money that you take for the SBA loan cuts away from
17 that. He knew he had a line of credit. He knew it was to be
18 used for cars.

19 So he can't have it both ways either. So I think I've
20 explained that pretty thoroughly. So that deals with the first
21 element.

22 On the second element, the representation was falsely
23 made, well, we just -- we deny -- we deny that there was a
24 representation, so that's just denied.

25 Then the next one is -- the third element is the

1 representation was material to the transaction. Well,
2 materiality means -- I don't -- you know, what's a simple
3 analogue? I suppose, you know, why do you decide to go to a
4 movie tonight and some -- you know, there's maybe five things
5 that -- somewhat relevant, but they're not the major reason you
6 went to the movie. You wanted to go to the movie because you
7 promised your husband or wife that, by golly, we'll go to a
8 movie on Friday night, not because of other reasons. So it's
9 gotta be the main reason.

10 They walk out of that meeting supposedly with a floor
11 plan. They don't know the amount of it. They don't know how
12 long it is. They don't know the interest rate.

13 Well, I mean, gosh, why do you have to know all those
14 details? Well, how about this? What if the bank had made a
15 promise and the promise was we'll floor plan \$50,000? I think
16 we'd be in court with Mr. Lucken saying you knew that wasn't
17 enough to make him a viable business; it wasn't enough floor
18 plan, and you caused me to lose my 500,000 because your floor
19 plan was so tiny; it had to be bigger.

20 Okay. That's ridiculous. Not 50,000. Let's make it
21 500,000. Well, Dirks has said, "I needed at least a million."
22 So to know what the floor plan was was critical and material to
23 this event.

24 Next element, four, we can skip over th -- I mean, we
25 don't even have to really talk about it. Said that it was false

1 when made. We say we didn't do it.

2 The next one, five, intended to deceive. Well, their
3 own expert testified about the typical procedure for Ford and
4 how they liquidated and what they would need to do. And he
5 understood that they'd take cars and then they'd take parts.
6 Every -- every one of our witnesses that has knowledge about
7 floor planning says, of course, Ford would be the first lien.
8 And so when we go through and show all those prior lien
9 searches -- and with all due respect to plaintiff, when we've
10 got documents where it's typed X and dates written, I mean, now
11 we're talking about the deception must have run so deep and the
12 corruption so bad that various people in the bank are making
13 dates up and Xing documents just because it's part of their
14 master plan to ensure that this SBA loan guarantee is adhered to
15 or is not jeopardized.

16 Again, at the end of the day when we're talking about
17 these various things that happened or are questioned about the
18 SBA loan guarantee, SBA is reviewing all this. They review it
19 before. They monitor it during. And it's tough to get that
20 loan guarantee. They are monitoring -- they're looking at
21 everything. Not only now were they talking about the first
22 lien, they're bringing up all these other issues, and the SBA
23 didn't. They paid it. They ultimately paid it.

24 And by the way, if Heritage intended to deceive
25 Mr. Lucken, why in the world would they have created that

1 letter, Exhibit 50? And it wasn't -- by the way, this is not a
2 letter where Crim wrote this letter and Mr. Crim signed it
3 saying, hey, here's what I understand it to be and sign it
4 because, you know, we can send letters. I could send a letter
5 to someone and say this is what I think what happened, and if
6 they don't write back, what does that mean? Does that mean they
7 agree with it? Does that mean they disagree with my letter?

8 He sent it so the Luckens could read the letter and
9 they decide do we agree with this, and that letter says this is
10 a line of credit; it's secured. Oh, it's secured. That's right
11 because there's assignment of CD we also signed. And then --
12 and then also it says, hey, and, by the way, you know, if your
13 deal ever changes, let us know. Why? Because the bank doesn't
14 want to get on the hook, be in a lawsuit, have people upset with
15 them saying, you know, what if Lucken said I didn't want that
16 deal anymore with Dirks? He doesn't tell the bank, and suddenly
17 there they are in trouble.

18 So one thing that wasn't mentioned is Mr. Lucken is
19 asking for the \$45,000 back on the life insurance, and he's
20 discounting that there's any value to that life insurance. He
21 obviously thought there was a value. He paid \$45,000 for it.
22 He testified the one policy that was paid up for 250, there was
23 a loan against it he thought of about 150,000. Dick Dirks who's
24 been referred to as having a sharp memory said I think there's a
25 loan of about 50 to -- I think he might have said 50 to 70, in

1 that range. That's the loan against it.

2 The other one, the 300,000, there's no loan against
3 it; \$5,000 a year premiums, \$300,000.

4 And I don't mean to be morbid or mean spirited when I
5 say this, but these are elderly people. Mr. Dirks is 89. His
6 wife I think was -- he said was 84, 85, in that age range.
7 These are not people that are 20 years old and you hold a policy
8 thinking when will I ever get paid that policy? I mean, he took
9 that because he -- again, he's not morbid, but he thought that
10 policy has a value; I want to buy that policy. So that has a
11 value to it.

12 I just want to look at the next one. Well, we talked
13 about that, whether they had any justification.

14 Actually go down for the -- go down to the next one,
15 the next after that. I think there's eight. Yes, I want to
16 look at that. And this is -- Ms. Liston, just go back up so we
17 can see what number that is.

18 That's under number 6: The Luckens justifiably relied
19 on the representation. Now let's go down to those.

20 I put a quick mark by each one. I mean, all of those
21 militate against Mr. Lucken. Sophistication, expertise of the
22 Luckens. Very sophisticated. I mean, I think I've made that
23 point again and again.

24 There was no relationship between Heritage Bank and
25 Lucken. This was a first-time thing, so he didn't have a

1 relationship that he'd established that he relied upon them for
2 certain things.

3 Their access, all he had to do was ask Dirks.
4 Couldn't ask the bank. Bank has a relationship with Dirks.

5 Their opportunity to detect the fraud. Well, that
6 again gets back to asking for information. Whether they had
7 initiated the transaction, they did. They came along. Mr. Crim
8 didn't seek them out.

9 How general or specific, well, it appears to be,
10 according to Lucken, extre -- Mr. Lucken, extremely general.
11 We'll do floor planning, end of story.

12 Lack of any fiduciary relationship, and that's
13 explained in a prior instruction which says that there is no --
14 there was no fiduciary relationship between these parties.

15 Oh, by the way, when it's said as to was this unusual
16 to have this line of credit to buy cars with, yeah, it was real
17 unusual because you had a company that was -- this was a
18 last-ditch effort by Mr. Lucken to help this company.

19 The tied, I'll talk for just a moment about the tied,
20 if we look at that for a minute, Ms. Liston. Just go down to
21 the -- just go down to the number one. I only have -- no, I
22 want to talk about the bold-faced portion, and that's the only
23 time I have to talk or -- and my time will be up.

24 They conditioned its promise to provide floor plan
25 financing on the conditions the Luckens execute the Lucken line

1 of credit. And do you see there that it says on January 19,
2 2012? Mr. Lucken has testified all that happened on January 19,
3 2012, were here's a note, here's assignment of CD, sign these.
4 No -- he said there was no conversation. It was just very
5 brief.

6 This claim fails. He cannot prove that anything
7 happened on that date other than sign these documents. That's
8 what he says, his own words. That's what he says. He says, "I
9 got them. I didn't understand them." He didn't say sign this
10 document; this is what this document means; and then we're going
11 to give you a floor plan in exchange for signing that document.
12 That conversation didn't happen. By his own words it didn't
13 happen.

14 So at the end of the day -- if you'd put up the
15 verdict form, and I've checked -- it goes on for another page.
16 You don't -- we're asking that you never get to the other page
17 or the second page. It just -- we ask that when you go through
18 and you check and decide is there liability by Heritage Bank,
19 you're asked was there fraud? No. It's Heritage. It's for
20 Heritage. Was there an unlawful tying arrangement, this event
21 that allegedly occurred on January 19, 2012? And you'll mark
22 effectively -- you'll mark an X for Heritage saying no, there
23 wasn't.

24 I am not here to castigate Mr. Lucken. From the times
25 I've spent with him in deposition and throughout this trial,

1 he's been a respectful person. I think he is a wonderful
2 benefactor for his community. I think what he did here is he
3 was so intent on being a benefactor for a business in the
4 community that he lost sight of the fact that Dick Dirks very
5 well may never be able to pay me back. In fact, there's a
6 pretty good chance of it. He knew that even without doing the
7 due diligence that Mr. Welte talked about that he should have
8 done. I mean, he knew just by virtue of the fact that he
9 couldn't get money from a bank that he probably had significant
10 struggles. But he did it anyway.

11 And now he's looking to point fingers and say, "Dick
12 Dirks didn't pay me back." And Dick Dirks is up here, you know,
13 in a way kind of acting like I'm the victim in this case. No.
14 You made a promise. You had a struggling business. Good for --
15 you know, good for you that you had a business, but it was
16 struggling, and then you -- in a last-ditch effort you reached
17 out to Mr. Lucken, and he lent you \$500,000.

18 He did to Mr. Lucken what he'd done to Ford. He
19 bought cars from Ford, sold them, didn't pay Ford back. He did
20 the same thing to John Lucken. He bought cars, got money for
21 those cars, and didn't pay it back. He never paid a penny of it
22 back. That's why -- this isn't -- on the second 250, it's not
23 Mr. Lucken's asking for 150 because Dirks did pay a hundred. He
24 never paid a penny back of any of this money other than he did
25 assign -- he did assign the life insurance which does have a

1 value. He never wrote a check for anything. He did give those
2 life insurance policies which, as I'm telling you, do have
3 value, a great value, or Mr. Lucken who is a sophisticated,
4 savvy businessman would not have paid 45,000 for. Thank you for
5 your time.

6 THE COURT: Thank you.

7 Mr. Thompson, your rebuttal closing argument?

8 MR. THOMPSON: Yes, Your Honor. All right. You're
9 about ready to go deliberate. I don't want to get in your way.
10 I've got five points I want to make.

11 One, Mr. Reinschmidt talked about Mr. Lucken not
12 reading, you know, the line of credit document, Exhibit 46. I
13 mean, think about your own experience on a mortgage closing.
14 You go in; you just sign the documents. And the reason you do
15 is because you've already talked about the deal before you get
16 there; right?

17 Now, I would agree if you didn't talk to your bank
18 about the terms, you just plopped into a closing room and
19 started signing, yeah, that's probably pretty reckless.

20 But that isn't what happened here. They had met with
21 Crim, July 8, 2 conditions, then floor plan. So why would John
22 think the bank's going to create documents that don't reflect
23 what they talked about? Just like when I go sign a mortgage,
24 the banker sneaks in more interest, I'm probably not going to
25 catch it, but you expect them to do the right thing.

1 This UCC search, you know, they seem to be really
2 sensitive about that. The only record they ever checked with
3 the Secretary of State by the search record was in 2011. And
4 they got a checklist. But where's the proof? I mean, it's
5 their files. They don't have any proof in 2010 they did the
6 search other than chicken scratch.

7 And more importantly, they don't have even a chicken
8 scratch for checking in 2009 when they did the loan.

9 Let me go over Exhibit 50 just so everybody's clear on
10 why that was necessary. So if on the 19th John signed a CD
11 assignment so he has a CD at the bank already, he assigns it
12 over to the line of credit so that line of credit when it's
13 drawn on is backed up by the CD, but at that point, without
14 Exhibit 50, the letter, Dirks can't use it because it's John's
15 line of credit. John's the only one who could use it.

16 So Exhibit 50 was the necessary tool that allowed
17 Dirks to be able to draw on that line of credit. And that's
18 what John -- you know, he doesn't have a problem with that, but
19 I want you to understand why the bank had to get that done and
20 why they wanted it done the day before John came in.

21 Let me talk about that life insurance. Once again,
22 John has not got one penny on that yet. I didn't see anything
23 in Judge Bennett's instructions that says his damages he
24 recovers is affected by the life insurance. And, more
25 importantly, John testified that in -- later this year he's

1 gotta start paying additional premium if he wants to keep one of
2 those policies. John may decide not to even do that, but even
3 if he does, he's got to start paying even more to keep it.

4 I'm going to end with what Mr. Reinschmidt started
5 with. He came in here and said, well, trust us. We aren't
6 going to do this again. Really. Let's make sure that doesn't
7 happen. Best way to do that, little punitive damage. Let's
8 just make sure this doesn't happen again. Go back there and do
9 justice. Thank you.

10 THE COURT: Thank you. Members of the jury, we just
11 have one final instruction which is number thirty -- I'm sorry,
12 on page 34, number 17, page 34, number 17. So if you'd follow
13 along, it's entitled deliberations, number 17.

14 (The Court read instruction number 17 in open court.)

15 THE COURT: And then if you'd turn the page, you'll
16 see the verdict form. And I'm not going to read every word of
17 it, but I'm just going to cover it generally. This is how we
18 know what your decision is.

19 Section 1 is on liability. And there's a section for
20 each of the two claims, the fraudulent misrepresentation and the
21 unlawful tying arrangement. And you just check who do you rule
22 for, the Luckens or Heritage.

23 If you rule for the Luckens on either one of those
24 claims, then you go to number 2, damages. And there's a place
25 for compensatory damages for fraudulent misrepresentation and

1 the unlawful tying arrangement.

2 And then if you find in favor of the Luckens on the
3 fraudulent misrepresentation claim, then you may but certainly
4 are not required to decide whether or not punitive damages
5 should be awarded, and there's a place to check, a question that
6 you need to answer, and the amount a -- I'm sorry, the amount,
7 then the question you need to answer. And then it's dated;
8 foreperson will sign it, and the other six jurors will sign it
9 as well.

10 I just wanted to tell you what happens if I get a note
11 from the jury. I never respond as quickly as you would like me
12 to because I need to tell you the process.

13 So when we get a juror note, we have to contact the
14 lawyers. They may or may not be in the building. We may have
15 to contact them by cellphone. I have to read the note to them.
16 We have to get Shelly, our court reporter. I have to listen to
17 their views about how they think I should respond to the note.
18 Sometimes it's relatively easy, and all three of us agree.
19 Sometimes it's not so easy, and we have three different views of
20 how to respond. I think you can figure out my view is the one
21 that prevails. But I have to, you know, pay attention to the
22 lawyers because they a lot of times have really good reasons why
23 we ought to respond in a certain way. And then I -- almost
24 always rather than calling you back into the courtroom, I
25 prepare a written response.

1 So that -- I don't tell you that to either encourage
2 or discourage a jury note. I just tell you that so that you
3 won't be quite as frustrated with me as I would be in your shoes
4 if I didn't know the process that we're required to go through.

5 So again, you can deliberate as long as you'd like
6 today. And just let the CSOs know when you're going to be going
7 home, particularly if you haven't reached a verdict today, and
8 when you'll be coming in tomorrow so that I can let the lawyers
9 and everybody else know.

10 We're going to have all the exhibits that have been
11 admitted brought down to you. That will take a few minutes. We
12 have to sort that out with the lawyers. I think your lunch
13 probably hopefully will be here. So enjoy your lunch.

14 Good luck in your deliberations. And thank you very
15 much for being so attentive. The lawyers -- on behalf of the
16 lawyers, I know they really appreciate it, and I do too. So
17 good luck to you. Thank you.

18 (Jury out at 11:52 a.m.)

19 THE COURT: Thank you. Please be seated.

20 So what about this other testimony on the equitable
21 matters? What do you want to do about that?

22 MR. LAWRENCE: Your Honor, I think that the
23 evidence -- from our point of view on unjust enrichment, I think
24 we have everything in the record between exhibits and testimony
25 that we need. So I don't believe that we need to offer any

1 additional testimony at this time.

2 THE COURT: Okay. Well, you say at this time.

3 MR. LAWRENCE: I'm sorry. I --

4 THE COURT: Does that lead you to believe there might
5 be another time?

6 MR. LAWRENCE: No, Your Honor.

7 THE COURT: Okay. That's a common thing that lawyers
8 say, you know, always wanting to hedge; right? I get that.

9 Mr. Reinschmidt?

10 MR. REINSCHMIDT: I know one thing I'm not going to
11 say. I'm not going to say honestly to you, Judge.

12 THE COURT: Really.

13 MR. REINSCHMIDT: Frankly. That's the only word I'll
14 use with you. I'm always honest. Frankly, I think that we
15 don't need to offer --

16 THE COURT: Sometimes you're not frank? You can't
17 win, can you?

18 MR. REINSCHMIDT: Negative pregnant, no. I won't use
19 any, any qualifier.

20 THE COURT: Just say it.

21 MR. REINSCHMIDT: I think we -- I think we've gotten
22 all the testimony that we need relative to those two claims.

23 THE COURT: Okay.

24 MR. CROSS: The only thing I would add, Judge, is
25 since they are now saying they rest we would do a Rule 50 motion

1 with respect to their unjust enrichment and contract rescission
2 claims.

3 THE COURT: Okay. I assume that's resisted.

4 MR. THOMPSON: (Nodded head.)

5 THE COURT: Okay. Reserve ruling.

6 I wanted the clients to know -- and I don't often
7 actually get to say this -- it wasn't the sexiest or most
8 interesting case I've ever had, but I'll tell you this. The
9 lawyers were as well prepared as any case I've ever had, and
10 I've had hundreds of jury trials. And they were absolutely the
11 best of any trial I've ever had in dealing with the documents
12 and being able to show the documents and highlighting. That was
13 done superbly. And obviously the lawyers had total mastery of
14 the facts. So the lawyers did an excellent job. And I
15 understand your case a little bit better now. So be reassured.

16 So all bets are off. I generally try and uphold a
17 jury verdict if I can because that's why we have a Seventh
18 Amendment. And just because I would reach a different result --
19 and I'm not saying that I -- I don't know what result I would
20 have reached. But primarily in criminal cases I often would
21 find the defendant not guilty, but I rare -- I've only set
22 aside, I think, four guilty verdicts even though I've disagreed
23 with quite a few of them because, you know, in that case we have
24 a Sixth Amendment and try and honor the jury verdict whenever we
25 can.

1 So where are we on exhibits, Denise? Are they kind of
2 ready to roll?

3 THE CLERK: Yes, we're just going to finalize the
4 list.

5 THE COURT: Okay. And I just have a question for you
6 if you can -- oh, I'm sorry.

7 THE CLERK: That's all right.

8 THE COURT: Okay. What percentage of the exhibits
9 that -- and they were all admitted -- were actually testified to
10 by a witness or talked about in opening or closing argument?
11 I'm just curious.

12 MR. THOMPSON: Rebecca Bishop tells me about 25
13 percent.

14 MR. REINSCHMIDT: Well, I was in the ballpark. I was
15 going to say 20 to 30 percent was my estimate. Yeah. And if I
16 understand it -- Mr. Thompson and I haven't talked about this,
17 but kind of your admonition in pretrial about seems like a lot
18 of exhibits, guys, I mean, I think -- and I want to make sure
19 that you're agreed with this, that this is okay. You know, our
20 thought is we're going to go through them now and we may not
21 offer all them.

22 THE COURT: Well, they're all offered and admitted.
23 So it's too late for that.

24 MR. REINSCHMIDT: Okay.

25 THE COURT: But any -- any exhibits that you two

1 decide to withdraw, that's fine. Anything you agree to with
2 regard to -- you want to send them all back, that's fine. You
3 want to only send back the ones -- whatever you agree on. If
4 you can agree, that's great. I've got a conference call I'm
5 going to try and catch.

6 MR. LAWRENCE: Your Honor?

7 THE COURT: Yes.

8 MR. LAWRENCE: Very briefly on the record?

9 THE COURT: Yes.

10 MR. LAWRENCE: I would like to make sure we have a
11 Rule 50 motion on their equitable defense of setoff on the
12 record for the reasons that we set forth in our last objections
13 to the Court's jury instructions, that it has been waived and
14 that the bank valued the policies at \$45,000 and were paid that.
15 So anything else they would be getting in, you know, unclean
16 hands or unjust enrichment by counting any excess value and
17 their benefit and all the other reasons we set forward in that
18 filing with the Court.

19 THE COURT: Okay. Thank you, Mr. Lawrence.

20 Anything else before we adjourn?

21 Are you all -- you know, my experience generally is
22 that if we get a question it's usually in the first hour. So I
23 don't know if you're planning on sticking around or you're all
24 taking off. Just let Denise know, and then, you know, we'll
25 call you by cellphone. But our local rule I believe says we can

1 spend up to 15 minutes trying to contact you, and I've driven
2 between here and Des Moines a lot, and there's not -- there's
3 usually phone service.

4 MR. THOMPSON: Mr. Lawrence and I are going to stay
5 here.

6 THE COURT: Oh, okay.

7 MR. THOMPSON: Throughout.

8 THE COURT: Okay.

9 MR. REINSCHMIDT: And I'll just be at my office a few
10 blocks away.

11 THE COURT: Okay.

12 MR. REINSCHMIDT: So I'll leave Denise with both my
13 cellphone and my office number.

14 THE COURT: Okay. That's great. Thank you. Really,
15 really well-trying case. Thank you very much.

16 Could I see counsel just up at a sidebar real briefly
17 off the record? I just want to point something out.

18 (At sidebar off the record.)

19 (Recess at 11:58 a.m.)

20 THE COURT: Okay. You all ready? Here's what we'll
21 do.

22 MR. THOMPSON: The Luckens are.

23 MR. LAWRENCE: Mr. Lucken should --

24 THE COURT: Oh, is he coming?

25 MR. THOMPSON: They were at the hotel with us.

1 THE COURT: We'll wait.

2 MR. REINSCHMIDT: He's downstairs.

3 THE COURT: Okay. Yeah, we'll wait for him. You bet.
4 Thank you for telling me that.

5 (A discussion was held off the record.)

6 THE COURT: Okay. Ready? Are we ready now to have
7 the jurors brought in?

8 Let me -- before we do that, I'll just tell you the
9 procedure. The foreperson -- we did get a note. It says, We
10 have a verdict. Karla Byl, fore -- she put foreman,
11 interestingly. And so I'll just ask her if the jury's reached a
12 unanimous verdict. Then I'll have her hand the verdict form to
13 Denise. She'll hand it to me. I'll read it to make sure
14 nothing's inconsistent. I'll announce it in open court. Then
15 I'll poll -- I always poll the jurors even though I have them
16 sign it just to make sure it's unanimous; okay? Thanks.

17 (The jury entered the courtroom.)

18 THE COURT: Thank you. Please be seated.

19 So, Miss Byl, I have a note from you that you're the
20 foreperson and the jury has a verdict; is that correct?

21 JUROR BYL: That's correct.

22 THE COURT: Would you please hand the verdict form to
23 Denise, and then I'll review it. Then I'll announce it in open
24 court. And then I'll ask everybody if it's a true and correct
25 verdict.

1 Okay. On the verdict form on liability on both claims
2 (a) and (b), the jury found for the plaintiffs. On compensatory
3 damages for fraudulent misrepresentation they awarded \$500,000;
4 on compensatory damages for unlawful tying agreement, \$45,000.
5 They found for Luckens on punitive damages and awarded four
6 million dollars in punitive damages and found that the
7 fraudulent conduct was directed specifically at the Luckens by
8 checking yes.

9 So I'm just going to poll each of the jurors starting
10 in the back row with Ms. Hansen.

11 Is this your true and correct verdict? And the answer
12 is either yes or no.

13 JUROR HANSEN: Yes.

14 THE COURT: Next, please.

15 JUROR SPENCER: Yes.

16 THE COURT: Next, please.

17 JUROR CHAPMAN: Yes.

18 THE COURT: Next, please.

19 JUROR PEDERSEN: Yes.

20 THE COURT: Front row?

21 JUROR BYL: Yes.

22 JUROR EPPINGA: Yes.

23 JUROR HURLBURT: Yes.

24 THE COURT: Okay. Thank you. I'm going to meet with
25 the lawyers for a minute or two, and then I'll be down to the

1 jury room to give you these evaluation forms that you get to
2 take home and fill out and try and answer any questions that you
3 might have. So I'll be down there in just a minute or two;
4 okay? Thank you for your service, and I'll see you in just a
5 minute. Thank you.

6 (The jury exited the courtroom.)

7 THE COURT: Thank you. Please be seated.

8 Well, congratulations to the plaintiffs, and our work
9 has only just begun. So why don't you all -- why don't both
10 sides get together and see if you can agree on kind of a
11 schedule for post-trial motions. Whatever you agree to I assume
12 because the award was so large we'll probably have an in-person
13 hearing on it rather than by telephone. But we can do it by
14 telephone. But let's just make sure that we get that entered
15 before any time -- but whatever time frame -- I'm sure you two
16 can agree. You've agreed on almost everything else, and we'll
17 go from there.

18 So just goes to show you what I know. I didn't see
19 that coming, although maybe a little bit after the closings. So
20 anyway, it was a super well-tried case, and we'll see what
21 happens on post-trial motions. So anything else?

22 MR. CROSS: So any post-trial motions you want us to
23 just do in writing and set a briefing schedule for rather than
24 make any motions now and follow it up with briefs?

25 THE COURT: Yeah. Yeah. Okay? Thank you.

1 And we'll have Denise make a copy of the verdict form,
2 and we'll get that filed.

3 (The foregoing trial was
4 concluded at 3:16 p.m.)

5
6 CERTIFICATE

7 I certify that the foregoing is a correct transcript
8 from the record of proceedings in the above-entitled matter.

9
10
11 S/Shelly Semmler 4-28-18
12 Shelly Semmler, RMR, CRR Date

13
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